

***United States Court of Appeals
for the Second Circuit***



APPENDIX

74-2207

ORIGINAL

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

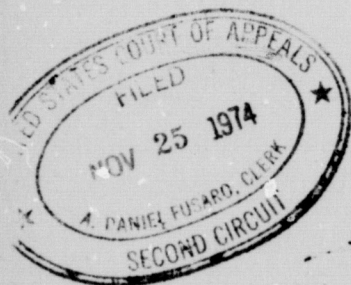
JOSEPH RAYMOND WENZLER,

Appellant.

*On Appeal from the United States District Court for the Southern
District of New York*

APPENDIX

SIDNEY MEYERS
Attorney for Appellant
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New York, New York 10007
WO 2-1593



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TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.:
VS.	Harry Batchelder, AUSA
WILLIAM BRANDT, II- 1-6	264-6395
DAVID ROSS MILEY-1, 2, 4&6	
JOSEPH RAYMOND WENZLER- 1, 5 & 9	
MARVIN THOMAS GOLDSTEIN-1 & 8	
DEAN PETER VAVARIGOS-1 & 3	For Defendant:
ROBIN BACHIA-1, 6 & 7	
JOHN GODISNSKY-1, 2 & 3	
JAN LANG-1 & 5	
DAVID FLORES-1 & 3	

ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DISBURSED
Fine,		9/1	Coker	5 -	
Clerk,		9/1	Vavarrigos	5 -	
Marshal, 7, 1, 2, 3, 4, 5, 6		9/1	Meas		10 -
Attorney,		9/1	Meas	5 -	
Commonwealth's Office, 21		9/1	Meas		5 -
846, 812, 841(a)(1), (b)		9/1	Meas	5 -	
Consp. to viol. Fed. Narcotic Laws (Ct. 1)		9/1	Meas		5 -
Distr. & possess. w/intent to distr.					
Diethylamide, I & Phencyclidine III. (Cts 2-9)					
(Nine Counts)					

DATE	PROCEEDINGS
2-21-74	Filed indictment.
2-25-74	Deft. Brandt (atty. present) Pleads not guilty. Deft. continued remanded in lieu of bail previously fixed by Mag. (\$15,000.) Motions returnable in 10 days.
	Miley (atty. present) Pleads not guilty. Deft. continued remanded in lieu of bail fixed at \$10,000. P.R.B. secured by \$3,000. Motions returnable in 10 days. Case assigned to Judge Pollack for all purposes.
	Brieant, J.
	-cont'd on next page-

DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
4/74	Deft Wenzler (atty present) pleads not guilty 10 days for motions. Bail fixed at \$5,000. P.R.B.		
	Deft Goldstein (atty present) pleads not guilty 10 days for motions. Bail fixed at \$15,000. P.R.B. secured by \$1,500. cash. Bail limits ext. for 1 trip. to S. Carolina.		
	Deft Varvaricos (atty present) pleads not guilty 10 days for motions Bail fixed at \$5,000. P.R.B.		
	Deft. Bachia-adj. to 3/11/74.		
	Deft. Godiowsky- adj. to 3/11/74.		
	Deft. Lang-adj. to 3/11/74.		
	Deft. Flores-(atty present) pleads not guilty. 10 days for motions Bail unsecured \$2,000. P.R.B. ordered photographed and fingerprinted. Pollack, J.		
4/74	DAVID FLORES-filed P.R.B. in the sum of \$2,000.		
7/74	WILLIAM BRANDT-filed notice of motion re: order permitting an in camera inspection of Grand Jury testimony, bill of particulars, etc ret: 3/18/74.		
7/74	David Ross Miley-filed remand dtd 2/25/74.		
7/74	Deft. Robin Bachia-bench warrant ordered. Deft John Godinsky-bench warrant ordered. Deft Jan Land-bench warrant ordered. Pollack, J.		
7/74	Filed MEMO-END. on motion for in camera inspection, etc. dtd 3/7/74., Motions disposed of as indicated hereon on the hearing. Pollack, J. mn		
7/74	ROBIN BACHIA) -bench warrant issued. JAN LANG) JOHN GODINSKY)		
18/74	Filed ORDER that upon the notice of motion and motion dtd 3/7/74 for discovery by counsel for Wm. Brandt II and proceedings con- ducted on 3/11/74 each request contained in Schedule A and B is disposed of as indicated. Pollack, J. mn		
26/74	D. Flores- filed CJA 23 financial affdvt.		
3/28/74	D. Flores- filed CJA 20 appointment of counsel, Stephen Gillers 250 Bway, NYC 10017. Schrieber, Magistrate. mailed copies		
3/74	S. Meyers Atty for defts notice of motion re: suppression, etc. ret: 4/10/74		
3/74	Deft Wm. Brandt (atty present) for bail application. Bail set at \$10,000. secured by \$3,000 cash to report to U.S. Marshals twice a week. Pollack, J.		
15/74	Filed Govt's Voir Dire.		

DATE

PROCEEDINGS

3-a

- 4/11/74 Filed MEMO-END. on motion dtd 4/3/74...Ordered, that the within motions are denied in all respects. There was probable cause for the arrest and the search yielding the contraband was voluntarily consented to by the deft, a college educated person. There is no evidence of any whereby coerciver or unfair tactics on the part of the arresting officers. Pollack, J mailed notices.
- 4/17/74 ALL DEFTS- filed magistrate's orig. papers-
(1) docket entry sheets (9)
(2) criminal complaint
(3) magistrate's warrants (3)
(4) disposition sheet
(5) appointments of counsel (6)
(6) notices of appearance (6)
(7) appearance bonds (4)
(8) temporary commitment.
- 4/22/74 Filed Govt's memo of law re: request to charge.
- 4/23/74 Filed Govt's requests to charge.
- 4/23/74 Filed deft Goldstein's motion re: order suppressing evidende
ret: no date.
- 4/25/74 Filed Govt's memo of law re: opposition to defense counsels' motion to dismiss the indictment on theory of multiple conspiracies.
- 4/26/74 Filed Govt's memo of law re: opposition to counsel: for deft. Goldstet: motion to suppress.
- 4/30/74 Filed Govt's memo of law in oppsoition to deft's request for an instruction for entrapment .
- 5/6/74 Filed (Jan Lang) warrant of arrest and return: unexecuted 4/12/74.
- 5/6/74 WILLIAM RUKAN- filed papers file in the Middle Dist. of Fla:
(1) rec'd of proceedings in criminal cases
(2) copy of assumption of custody request
(3) check list for U.S. Magistrates
(4) rec'd of responses to questions at bail reform act hearing
(5) order specifying methods and conditions of release
(6) appearance bond for deft Wm. Rudan
(7) conditions for admission to bail.
- 5/6/74 David Miley- filed magistrate's orig. papers:
(1) docket e ntry sheet
(2) appearance bond.
- 4/25/74 Hearing on motion by -atty Katz for William Brandt deft, to suppress is denied. Pollack, J.
- 4/29/74 Deft Goldstein (atty present) hearing held on motion to suppress - motion denied. Pollack, J.

-over-

PROCEEDINGS

1297 Brandt, Miley, Wanzler, Goldstein, Vavarigos, Bachia, Godinsky and
74 Flores - trial begun with a jury before Judge Pollack...

Deft. Brandt- (atty present) Now pleads Guilty as to
counts 1 and 3 only. Counts 2,4,5 and 6 are carried
until the date of sentence. Pre-sentence report ordered
For sentence 6/10/74 at 10 AM Rm 128. Deft. REMANDED
Trial cont'd as to the remaining defts. Pollack, J.

74 Trial cont'd. Deft Godinsky (atty present) now Pleads Guilty as to
counts 1 and 2 only. Count 4 carried until the date of sentence.
Pre-sentence report ordered. For sentence 6/10/74 at 10 AM rm 128.
Bail cont'd-----Trial resumes.----- Deft. Bachia (atty Robert
Koppelman present) Now Pleads guilty as to counts 1 and 6 only.
Count 7 carried until the date of sentence. Pre-sentence report
ordered. For sentence 6/10/74 at 10 AM rm 128. Bail cont'd.
Trial cont'd. as to remaining defts. Pollack, J.

74 Trial cont'd.

74 Trial cont'd. All parties rest. All motions denied.

74 Trial cont'd.

74 Trial cont'd. The court charged the jury. The jury began deliberating.

5 74 Trial cont'd. Jury resumed deliberating at 9:35 AM. Partial Verdict -
Deft. David Ross Miley found not guilty on count 2. Deft.
Joseph R. Wenger found GUILTY on count 5. Pollack, J.

74 Trial cont'd and concluded. Jury disagreement as to the remaining defts
and the remaining counts. All defense counsel move for a
mistrial- GRANTED. Deft. Wenzler moves to set the verdict on
count 5. Denied. Pre-sentence report ordered (to be held in abeyance
for two (2) weeks. For sentence 7/1/74 at 10 AM Deft. Wenzler to be
retried on counts 1 and 9. Bail cont'd. Pollack, J.

74 Wm. Brandt, II-filed acknowledgment of constitution rights (dtd 4/29/74)

74 John Godinsky-filed acknowledgment of constitutional rights (dtd 4/30/74)

74 Robin Bahia- filed acknowledgment of constitutional rights (dtd 4/30/74)

74 J. Godinsky-filed CJA 20 approval for payment of fees of atty. Pollack, J. mn

74 Deft. Brandt- (atty Robert A. Katz present)- Appl. for reddction of bail
to \$500. is GRANTED with consent of the Govt. Deft is released on
own recognizance with consent of the Govt. and given until 6/7/74
at 3P.M. to post reduced bail of \$500. Sentence date is adj'd
until 8/29/74 at 10AM room 2704. Pollack, J.

cont'd on next page pg5

DATE	PROCEEDINGS
6/10/74	John Godinsky- Filed JUDGMENT - It is adjudged that the deft. is sentenced as a YOUTH OFFENDER on each of counts 1 and 2 pursuant to Section 5010(a) of Title 18, U.S. Code. Imposition of sentence is suspended. Deft. is placed on probation for a period of TWO (2) YEARS, subject to the standing probation order of this Court. Special conditions of probation being that the deft. continue therapeutic treatment and find suitable employment and that within 48 hours he present himself to the Hudson County, New Jersey, Probation Department in connection with the pending alleged probation violation in that Court and further that he not leave this jurisdiction before the New York Probation Office ascertains the circumstances of his proposed residence in San Francisco, California. Count 4 is dismissed on motion of deft's counsel with consent of the Govt. Pollack, J. 6/11/74 Issued copies. ent. 6/11/74
6/13/74	Filed Govt.'s suppl. requests to charge.
6/11/74	Wm. Brandt III- filed appearance bond in the sum of \$250.
6/17/74	2nd Trial- D. R. Miley, J.R. Wenzler, M.T. Goldstein, D.P. Vavarigos and D. Flores- trial begun before Judge Pollack with a Jury.
6/18/74	Trial cont'd.
6/19/74	Trial cont'd.
6/20/74	Trial cont'd.
6/21/74	Trial cont'd and concluded. Jury verdict. All defts are found GUILTY as charged. Jury polled. Jury excused. All defts- pre-sentence report ordered. For sentence 9/9/74 at 10A.M. Rm 905. Bail cont'd. Pollack, J.
7/8/74	Filed transcript of record of proceedings, dated 4/10-11/74
7/12/74	Filed transcript of record of proceedings, dated Apr 30, May 4, 26, 1974
7/12/74	Filed transcript of record of proceedings, dated 4/30/74
7/16/74	ROBIN BACHIA- Filed JUDGMENT (atty present) Deft. is committed to the custody of the Atty. Gen'l. for imprisonment on each of counts 1 & 6 to run concurrently with each other for the maximum period authorized by law and for a study as described in Title 18, U.S. Code, Section 4208(c) and the Bureau of Prisons is requested to make neurological, a psychiatric and a psychological study the results of such studies to be furnished this Court within three months, unless the Court grants further time not to exceed three months, whereupon the deft. shall be returned to this Court and the sentence of imprisonment herein imposed shall be subject to modification in accordance with Title 18, U.S. Code, Section 4208(b). The Probation Department of this District is securing and will forward additional data to be received from available sources. Count 7 is dismissed on motion of the deft.'s counsel with consent of the Govt. Pollack, J. issued copies. Pollack, J. ent. 7/24/74
7/24/74	David Miley- filed CJA approval for payment of fees of atty. Pollack, J. mailed copies by CJA Clerk.

DATE

PROCEEDINGS

6-a

15-74 David Flores-Filed C.J.A. 20 Approval for payment of fees of counsel.
Pollack,J.

26-74 Dean Varvarigos-Filed CJA 20 approval for payment of fees of counsel.

20-74 Filed transcript of record of proceedings, dated 7/16/74

74--Filed letter from Br-Garland to Judge Pollack dtd 8/10/74,-----

74--Filed memo end: on letter from Br-Garland to Pollack,J;-letter dtd 8/10/74
is treated as a request for modification of terms of the sentence.--
Motion denied:--Pollack,J;-mn

74 Filed deft. M. Goldstein's notice of appeal from judgment rendered
9/9/74. (mailed copies: to M. Goldstein & U.S. Atty.)

20
74 Filed deft. D. Miley's notice of appeal from judgment dtd 9/9/74.
Leave to file appeal in forma pauperis is granted. Pollack,J.
mailed copies to: D. Miley & U. S. Atty.

74 Filed deft. D. Varvarigos- CJA form 23 financial affdvt:

74 D. Miley-filed CJA 23 financial affdvt.

74 William Brandt, III- Filed Judgment (atty. present) Deft. is committed
to the custody of the Atty. Gen.'l. for imprisonment for a
period of NINE (9) MONTHS on count 3. Pursuant to the provisions
of Section 841, Title 21, U.S. Code deft. is placed on Special Parole
for a term of TWO (2) YEARS to commence upon expiration of confin-
ement. Imposition of sentence on count 1 is suspended and deft. is
placed on probation for TWO (2) YEARS to run concurrently with the
term of Special Parole and to follow the term of imprisonment imposed
on count 3. Counts 2,4,5 and 6 are dismissed on motion of deft.'s
counsel with the consent of the Govt. Deft. is cont'd on present
bail until 9/19/74 at 11 A.M. at which time he is to surrender to
the U.S. Marshal in room 506 for service of sentence. Pollack,J.
Issued copies ent. 9/13/74

74 David Flores- Filed Judgment (atty. present) Deft. is committed to the
custody of the Atty. Gen.'l. for imprisonment on each of counts
1 and 3 to run concurrently with each other pursuant to Section 4208(b)
Title 18, U.S. Code, for study report and recommendations. This
commitment deemed to be for the maximum sentence authorized by law,
to wit FIVE (5) YEARS. The Bureau of Prisons is requested to make
neurological, psychiatric and psychological study. The results of
such study to be furnished within 3 months, unless the court grants
further time to exceed THREE (3) MONTHS whereupon the deft. shall
return to this Court and the sentence of imprisonment herein
imposed shall be subject to the modification in accordance with
Section 4208(b), Title 18 U.S. Code. Deft is continued on present
bail pending appeal on condition that the Court be advised that
Notice of Appeal has been filed. Pollack,J.
Issued copies. ent. 9/13/74

-cont'd on present bail-

7-a

D. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS	Date Ord Judgment
9/9/74	<p>Marvin Thomas Goldstein (atty. present) Filed JUDGMENT - Deft. is committed to the custody of the Atty. Gen.'l. for imprisonment for a period of SIX (6) MONTHS on each of counts 1 and 8 to run concurrently with each other. Pursuant to the provisions of Section 841, Title 21 U.S. Code, deft. is placed on Special Parole for a term of TWO (2) YEARS to commence upon expiration of confinement. Deft. is cont'd on present bail pending appeal on condition that he file a notice of appeal this day. Pollack, J. Issued copies.</p>	ent. 9/13/74
9/9/74	<p>David Ross Miley (atty. present) Filed JUDGMENT - Deft. is committed to the custody of the Atty. Gen.'l for a period of TWO (2) MONTHS on each of counts 4 and 6 to run concurrently with each other. Pursuant to the provisions of Section 841, Title 21, U.S. Code deft. is placed on Special Parole for a term of TWO (2) YEARS to commence upon expiration of confinement. Imposition of sentence on count 1 is suspended and deft. is placed on probation for a TWO (2) YEARS to run concurrently with the term of Special Parole and to follow the term of imprisonment imposed on counts 4 and 6. Deft. is cont.'d on present bail until 9/19/74 at 11 AM at which time he is to surrender to the U.S. Marshall in room 506 for service of sentence. Pollack, J. Issued copies</p>	ent. 9/13/74
9/9/74	<p>Dean Peter Vavarigos (atty. present) Filed JUDGMENT - Deft. is committed to the custody of the Atty. Gen.'l. for imprisonment for a period of THREE (3) MONTHS on count 3. Pursuant to the provisions of Section 841, Title 21, U.S. Code deft. is placed on Special Parole for a term of TWO (2) YEARS to commence upon expiration of confinement. Imposition of sentence on count 1 is suspended and deft. is placed on probation for TWO (2) YEARS to run concurrently with the term of Special Parole and to follow the term of imprisonment imposed on count 3. Deft. is cont.'d on present bail pending appeal on condition that he file a notice of appeal on or before 9/11/74 Pollack, J. Issued copies.</p>	ent. 9/13/74
9/9/74	<p>JOSEPH RAYMOND WENZLER- (atty. present) Filed JUDGMENT - deft. is committed to the custody of the Atty. Gen.'l for imprisonment for a period of FOUR (4) MONTHS on each of counts 5 and 9 to run concurrently with each other. Pursuant to the provisions of Section 841, T. 21, U.S. Code deft. is placed on Special Parole for a term of TWO (2) YEARS to commence upon expiration of confinement. Imposition of sentence on count 1 is suspended and deft. is placed on probation for TWO (2) YEARS to run concurrently with the term of Special Parole and to follow the term of imprisonment imposed on counts 5 and 9. on Special condition that the deft. undertake counsel as directed by the Probation officer until such time as it is considered no longer necessary. Deft. is cont'd on present bail pending appeal herein. Pollack, J. issued copies</p>	ent. 9/13/74

-cont. 'd. on next page-

PROCEEDINGS

Date Order or
Judgment Note

- 9/15/74 David Flores- filed notice of appeal from judgment entered 9/9/74.
Leave to file the within notice of appeal in forma pauperis
is hereby granted. Pollack, J. mailed notices to:
U.S. Atty S. Gillers
- 9/25/74 Dean Varvarigos- filed notice of appeal from judgment entered 9/9/74
mailed copies to: U.S. Atty. D. Varvarigos.
- 9/21/74 J. Wenzler- filed notice of appeal from judgment entered 9/9/74.
mailed copies to: U.S. Atty. S. Meyers.
- 9/16/74 M. Goldstein- filed notice of appeal (copy)
- 9/16/74 Filed memorandum- Pursuant to Rule 24 of the Rules of Appellate
Procedure, the forma pauperis order heretofore entered
permits the processing of the appeal in forma pauperis unless
the Dist. Court shall certify that the appeal is not taken in
good faith, etc. In forma pauperis on appeal is granted. Pollack, J. mn
- 9/19/74 William Bradnt- filed notice of appeal from judgment dtd 9/9/74.
mailed copies.
- 9/28/74 Filed transfer of jurisdiction of probationer to the Northern
District of California (deft. John Godinsky) and order
of acceptance of transfer. Conti, J.
- 9/26/74 M. Goldstein- filed CJA approval for payment of fees of atty.
Mailed copies by CJA Clerk. Pollack, J.
- 9/26/74 Wm. Brandt- filed notice that the record on appeal has been
certified and transmitted to the U.S.C.A.
- 9/26/74 Wm. Brandt- filed suppl. notice that the record on appeal has
been certified and transmitted to the U.S.C. A.
- 9/25/74 J. Wenzler- filed CJA approval for payment of fees of atty.
mailed copies by CJA Clerk. Pollack, J.
- 9/26/74 D. Miley- filed CJA approval for payment of fees of atty. mailed
copies by CJA Clerk. Pollack, J.
- 9/27/74 Wm. Brandt, Jr. Filed commitment. Delivered to 9/27/74 F.D.H. N.Y.C.
- 9/27/74 D. Miley- Filed commitment. Delivered to 9/19/74 F.D.H. N.Y.C.
- 6/74 Jan Lang--Filed papers origionally, filed with Magistrate Raby:
(1) Docket Entry Sheet
(2) Disposition Sheet
(3) Notices of Appearance
(4) Appearance Bond(s)

-Over to next page-

D. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS	Date Of Judgment
10/16/74	Robin Bachia- Filed JUDGMENT (atty. present) deft. committed on 7/16/74 for study and report it is now ordered that the execution of the remainder of said sentence of imprisonment be suspended and the deft. placed on Probation for a period of THREE (3) YEARS on condition that deft. shall during such probation and commencing forthwith, reside in the New York Community Center for up to 120 days in accordance with Public Law 91-492 and further, as a condition of probation shall take drug abuse after care treatment as directed by the U.S. Probation Officer, all subject to such other provisions with respect to the deft. on and during probation as the Court deems appropriate as set forth in Public Law 91-492. The deft. is also placed on Special Parole for a period of TWO (2) YEARS to run concurrently with the said period of probation to commence upon expiration of the confinement heretofore and herein imposed. Title 21, Section 841, U.S. Code. Pollack, J. Issued copies. ent. 10/17/74	
10/24/74	Filed Deft. Land's notice of motion and affirmation re: bill of particulars, etc.	
10/21/74	D. Varvarigos- filed CJA 20 appointment of Laurence E. Jacobson, Esq. Mailed copies by CJA clerk. Pollack, J.	
10/21/74	D. Varvarigos- filed CJA 20 approval for payment of fees of atty. Mailed copies by CJA Clerk. Pollack, J.	
10/23/74	D. Flores- filed CJA 23 financial affdvt.	
10/30/74	Filed transcript of record of proceedings, dated 4/29-30/74 5/1-2-3-6-7-8/74	
11/4/74	Filed transcript of record of proceedings, dated 6/17-18-19-20-21/74	
10/31/74	Filed memo-end. on motion dated 10/24/74. Submission 74 Cr. 188 - On Court's decision hereon as shown next to each item. Pollack, J. mn.	
11/8/74	R. Bachia- filed CJA 20 approval for payment of fees of atty. Mailed copies by CJA Clerk. Pollack, J.	
11/8/74	Wm. Brandt- filed CJA 20 approval for payment of fees of atty. Mailed copies by CJA Clerk. Pollack, J.	
11/11/74	J. Godinsky--Filed papers originally filed with Magistrate Raby: (1) Docket Entry Sheet (2) Disposition Sheet (3) Notices of Appearance (4) Appearance Bond (5) Final Commitment(s)	
11/12/74	Filed transcript of record of proceedings, dated 4/29/74	

UNITED STATES OF AMERICA

- v -

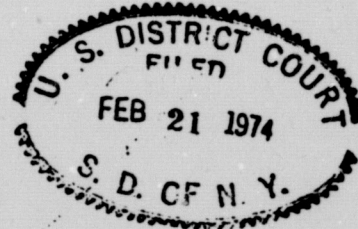
WILLIAM BRANDT II,
DAVID ROSS MILEY,
JOSEPH RAYMOND WENZLER,
MARVIN THOMAS GOLDSTEIN,
DEAN PETER VAVARIGOS,
ROBIN BACHIA,
JOHN GODINSKY,
JAN LANG, and
DAVID FLORES,

Defendants.

10-a

INDICTMENT

74 Cr.



COUNT ONE

The Grand Jury charges:

1. From on or about the 1st day of November, 1973 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, WILLIAM BRANDT II, DAVID ROSS MILEY, JOSEPH RAYMOND WENZLER, MARVIN THOMAS GOLDSTEIN, DEAN PETER VAVARIGOS, ROBIN BACHIA, JOHN GODINSKY, JAN LANG and DAVID FLORES, the defendants and others to the Grand Jury unknown, unlawfully intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(B) of Title 21, United States Code.
2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowing would distribute and possess with intent to distribute Schedule I and II controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(B) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

MICROFILM

FEB 22 1974

On or about November 27, 1973 defendants WILLIAM BRANDT II, DAVID ROSS MILEY and JOHN GODINSKY sold a quantity of lysergic acid diethylamide for \$650.00.

On or about December 13, 1973 defendant WILLIAM BRANDT II went from the Village Plaza Hotel, 79 Washington Street, New York, New York to the vicinity of Avenue A and East 11th Street.

On or about December 13, 1973 defendants WILLIAM BRANDT II, DAVID FLORES and DEAN PETER VAVARIGOS had a meeting in apartment 4A, 501 East 11th Street, New York, New York.

On or about December 13, 1973 defendants WILLIAM BRANDT II, DAVID FLORES and DEAN PETER VAVARIGOS sold a quantity of phencyclidine for \$1,800.00.

On or about January 3, 1974 defendant JOHN GODINSKY went from the area of the Village Plaza Hotel, 79 Washington Street, New York, New York and proceeded to the area of West Fourth Street and Bowery Street.

On or about January 3, 1974 defendants WILLIAM BRANDT II, DAVID ROSS MILEY and JOHN GODINSKY sold a quantity of lysergic acid diethylamide for \$1,925.00.

On or about January 10, 1974 the defendant DEAN PETER VAVARIGOS gave away a quantity of phencyclidine as a sample.

On or about January 15, 1974 the defendants WILLIAM BRANDT II, JAN LANG and JOSEPH RAYMOND WENZLER sold a quantity of lysergic acid diethylamide for \$1,200.00.

On or about February 12, 1974 the defendants WILLIAM BRANDT II, DAVID ROSS MILEY and ROBIN BACHIA sold approximately 1800 dosage units of lysergic acid diethylamide for \$660.00.

On or about February 12, 1974 ROBIN BACHIA transported to the area of 3rd Avenue and St. Marks Place approximately 10,000 dosage units of lysergic acid diethylamide.

COUNT TWO

The Grand Jury further charges:

On or about the 27th day of November, 1973 in the Southern District of New York, WILLIAM BRANDT II, DAVID ROSS MILEY and JOHN GODINSKY, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I controlled substance, to wit, approximately 164.8 milligrams of lyergic acid diethylamide in the form of 1000 dosage units.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B); Title 18, United States Code, Section 2.)

COUNT THREE

The Grand Jury further charges:

On or about the 13th day of December, 1973 in the Southern District of New York, WILLIAM BRANDT II, DAVID FLORES and DEAN PETER VAVARIGOS, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule III controlled substance, to wit, approximately 27.11 grams of phencyclidine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B); Title 18, United States Code, Section 2.)

COUNT FOUR

The Grand Jury further charges:

On or about the 3rd day of January, 1974 in the Southern District of New York, WILLIAM BRANDT II, DAVID ROSS MILEY and JOHN GODINSKY, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I controlled substance, to wit, approximately 665087.5 micrograms of lysergic acid diethylamide in the form of 3850 dosage units.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B); Title 18, United States Code, Section 2.)

COUNT FIVE

13-a

The Grand Jury further charges:

On or about the 15th day of January, 1974 in the Southern District of New York; WILLIAM BRANDT II, JAN LANG and JOSEPH RAYMOND WENZLER, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I controlled substance, to wit, approximately 320.26 milligrams of lysergic acid diethylamide in the form of 4070 dosage units.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B); Title 18, United States Code, Section 2.)

COUNT SIX

The Grand Jury further charges:

On or about the 12th day of February, 1974 in the Southern District of New York, WILLIAM BRANDT II, DAVID ROSS MEILLY and ROBIN BACHIA, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I controlled substance, to wit, approximately 1800 dosage units of lysergic acid diethylamide.

(Title 21, United States Code, Sections 812 841(a)(1) and 841(b)(1)(B); Title 18, United States Code, Section 2.)

COUNT SEVEN

The Grand Jury further charges:

On or about the 12th day of February, 1974 in the Southern District of New York, ROBIN BACHIA, the defendant, unlawfully, intentionally and knowingly did possess with intent to distribute a Schedule I controlled substance, to wit, approximately 10,000 dosage units of lysergic acid diethylamide.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B).)

COUNT EIGHT

14-a

The Grand Jury further charges:

On or about the 12th day of February, 1974 in the Southern District of New York, MARVIN THOMAS GOLDSTEIN, the defendant, unlawfully, intentionally and knowingly did possess with intent to distribute a Schedule I controlled substance, to wit, approximately 4000 dosage units of lysergic acid diethylamide.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B).)

COUNT NINE

The Grand Jury further charges:

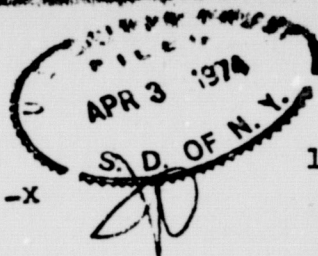
On or about the 12th day of February, 1974 in the Southern District of New York, JOSEPH RAYMOND WENZLER, the defendant, unlawfully, intentionally and knowingly did possess with intent to distribute a Schedule I controlled substance, to wit, approximately 295 tablets containing lysergic acid diethylamide.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B).)

Richard Eldridge
Foreman

Paul J. Curran
PAUL J. CURRAN
United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK.



15-a

UNITED STATES OF AMERICA

v.

WILLIAM BRANDT II
DAVID ROSS MILEY
JOSEPH RAYMOND WENZLER
MARVIN THOMAS VAVARIGOS
ROBIN BACHIA
JOHN GODINSKY,
JAN LANG, and
DAVID FLORES,

74 CR. 188
NOTICE OF MOTION

Defendants.

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavit of JOSEPH RAYMOND WENZLER, one of the above named Defendants, sworn to the 26th day of March, 1974, and the annexed copy of the Indictment herein, marked Exhibit "A", the said Defendant will move before the Honorable MILTON POLLACK, District Judge of this Court, at the United States Court House, Southern District of New York, Foley Square, New York City, New York, on the 10th day of April, 1974, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as Counsel can be heard for the following relief:

1. Pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, for an Order suppressing the use as evidence against him in the proceeding herein, of the following property, all now in the possession of the Government:
 - (a) "Tablets" assertedly containing "acid diethylamide", referred to in Count NINE of the Indictment herein;
 - (b) A Note Book, taken by the Government's Agents from the said Defendant's apartment on February 12th, 1974.
 - (c) All other property, if any, taken from the said Defendant's apartment located at #416 East 9th Street, New York City, New York, or from the said Defendant's person while in the said apartment, on the said 12th day of February, 1974,

in the following grounds:

1. That the property referred to was illegally seized without a warrant, or, alternatively,
2. If said property was seized under warrant:
 - (a) Upon information and belief, that the said warrant was and is insufficient, on its face, or,
 - (b) Upon information and belief, the property seized is not that described in the Warrant, or
 - (c) There was no probable cause for believing the existence of the grounds on which the warrant was issued, or
 - (d) The said Warrant was illegally executed

and, therefore, by virtue of all of the foregoing, the said Defendant's Constitutional rights under the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States were violated.

2. Pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, for an Order suppressing the use as evidence against him in the proceeding herein, of the following property, all now in the possession of the Government:

- (a) "Tablets" assertedly containing "acid diethyls" referred to in Count NINE of the Indictment herein.

- (b) A Note Book, taken by the Government's Agents from the said Defendant's apartment on February 12th, 1974.

- (c) All other property, if any, taken from the said Defendant's apartment located at #416 East 9th Street, New York City, New York, or from the said Defendant's person while in the said apartment, on the said 12th day of February, 1974,

in that they were obtained by, and are the result of, an illegal arrest of the Defendant.

3. Pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, for an Order suppressing the use as evidence against him in the proceeding herein of any and all information obtained from "leads" derived by the Government from and by the aforesaid personal property, in that said information was and is tainted, from its inception by the asserted, aforementioned illegality of the said Defendant's arrest, search and seizure.

4. Pursuant to Rule 11 of the Federal Rules of Criminal Procedure, for an Order dismissing the Indictment herein, as against the moving Defendant, on the ground that it has its genesis in, and is the result of, an illegal arrest of the said Defendant.

5. Pursuant to Rule 12 of the Federal Rules of Criminal Procedure:

- (a) That this Court inspect the Minutes of the Grand Jury which handed up the Indictment herein, and
- (b) After such inspection, an Order be made herei dismissing the Indictment herein as against the moving Defendant herein, on the ground that the said Grand Jury received incompetent evidence resulting from the aforementioned illegal arrest, search and seizure, and that there was no other and competent evidence on the subject on which the Indictment is based:

and that the said Defendant have such other, further and different relief as may be just and proper in the premises,

Dated, New York City,
New York, March 26th, 1974.

Yours, etc.
Sidney Meyers
SIDNEY MEYERS,
Attorney for Defendant,
JOSEPH RAYMOND WENZLER,
Office & P.O. Address,
51 Chambers Street,
New York, N.Y. 10007
Worth 2-1593.

TO: PAUL J. CURRAN,
UNITED STATES ATTORNEY,
Southern District of New
York,
United States Court House,
Foley Square, New York City,
New York.

HARRY FRACTENBERG, Esq.,
Attorney for David Ross Miley,
325 Broadway,
New York City, N.Y.

Rubin, Gold & Geller, Esqs.,
Attorneys for Marvin Thomas Goldstein,
299 Broadway, N.Y., N.Y. 10006.

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... ..
... ..
... ..
New York City, N.Y.

Robert Foppelman, Esq.,
Attorney for Robin Bachia,
115 Broadway,
New York, N.Y. 10006

Jack Curley, Esq.,
Attorney for David Flores,
Federal Defender Services Unit,
15 Park Row,
New York, N.Y. 10038.

Robert Katz, Esq.,
Attorney for William Brandt II,
233 Broadway, New York City, N.Y.,

----- X
UNITED STATES OF AMERICA

AFFIDAVIT

V.

WILLIAM BRANDT II
DAVID ROSS MILEY
JOSEPH RAYMOND WENZLER
MARVIN THOMAS VAVARIGOS,
ROBIN BACHIA,
JOHN GODINSKY,
JAN LANG, and
DAVID FLORES,

74 Cr/ 188

Dedendants.

----- X
STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

JOSEPH RAYMOND WENZLER, being duly sworn,
deposes and says that he is one of the Defendants above named.

Under the Indictment herein, a copy of
which is annexed hereto and made part hereof, marked Exhibit
"A", I am charged under Three Counts, to wit:

- (a) Under Count One, I am charged with being an alleged member of a Conspiracy to violate Sections 812, 841(a)(1) and 841(b)(1)(B) of Title 21, United States Code.
- (b) Under Count Five, I, together with two other Defendants referred to therein, am charged with an alleged violation of Title 21, U.S. Code, Section 812, 814(a)(1) and 841(b)(1)(B); Title 18, U.S. Code, Section 2, in that I, and the other two defendants "unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I controlled substance, to wit, approximately 320.26 milligrams of lysergic acid diethylamide in the form of 4070 dosage units", "on or about January 15th, 1974.
- (c) Under Count Nine, I, alone, am charged with an alleged violation of Title 21, U.S. Code, Sections 812, 841(a)(1) and 841(b)(1)(B), in that I "unlawfully and knowingly did possess with intent to distribute a Schedule I controlled substance, to wit, approximately 295 tablets containing lysergic acid diethylamide, "on or about the 12th day of February, 1974".

I have interposed a Not Guilty Plea to the
Indictment.

In January 1974, I resided in an apartment at #416 East 9th Street, New York City, New York. As I was about to take out my keys and open the door to my apartment, I suddenly found myself confronted by four individuals, each of whom was dressed in "Greenwich Village" Street Attire, and all of whom displayed guns. They did not identify themselves, and, conditions being what they are in my area, I assumed I was being held up. While surrounded by those individuals, and restrained by them from moving, they compelled me to involuntarily, and under compulsion and fear, turn over my keys to my apartment to them. At no time did any of them display or show me any arrest or search Warrant. After being compelled to turn over my keys, the four individuals then used my keys to open my closed apartment door, and I was then forcibly thrust into my apartment by them. Having thus gained access to my apartment, despite my protests, they then restrained me therein while they proceeded to make a shambles of my apartment by searching every part thereof and everything contained therein.

I was restrained in my apartment for a long period of time, during which time I was threatened by them with bodily harm and the destruction of my apartment belonging "unless I showed them where the dope was". Ignoring my protest they continued their search in my apartment, and assertedly found and took into their possession "tablets containing acid diethylamide", referred to in Count Nine of the Indictment. Further, without my consent, they forcibly took possession of a note book that belonged to me, containing names and address of friends, and other items of personal property.

Finally, after having remained in my apartment for a long period of time, and searching same while I was under their restraint, they forcibly removed me from the

apartment. It was only at that point that I was told, for the first time, that I was under arrest, and informed by them, for the first time, that they were law enforcement Officers of the United States.

It is my position, and I believe:

- (a) That the Government intends to utilize as evidence against me in the proceeding herein, the aforesaid alleged "tablets containing acid diethylamide", referred to in Count Nine of the Indictment, as well as the note book and any other personal property taken from me and my apartment as a result of the aforesaid search and seizure.
- (b) That the Government's Agents acted without a search warrant; that the items assertedly seized were not "in plain view"; that a Warrant to search the premises was a condition precedent to their lawful seizure, and that the absence thereof compels their suppression as evidence against me in the proceeding herein.
- (c) Further, that if the Government's Agents acted under a search warrant, the same was defective; the execution thereof went beyond its legal scope; and that there was no probable cause for believing the existence of the grounds on which the warrant was issued.
- (d) That I was illegally arrested, in that no arrest warrant had been issued, and there was no probable cause to make my arrest without such warrant.
- (e) That, in addition to suppression of the aforesaid items, as evidence against me in the proceeding herein, the Indictment against me should be dismissed on the grounds that it has its genesis in, and is the result of:
 - 1. An illegal arrest of your deponent, and
 - 2. The Grand Jury receiving incompetent evidence resulting from the illegal arrest, search and seizure referred to, and violation of your deponent's rights under the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States.

Consequently, I further respectfully request that this Honorable Court inspect the Grand Jury Minutes herein, which inspection may confirm the fact that there was no other and competent evidence on the subject on which the Indictment was based.

(f) Your deponent further respectfully submits that, under the facts and circumstances herein, the failure of the Government Agents to give notice of their identity in compelling your deponent to turn over the keys to the apartment and their entry thereunder was violative of Section 3107, Title 18, U.S.C., and, therefore, that the arrest and seizure referred to must and does fall with it.

(g) Upon information and belief, that, if the Government developed any "leads" or information pertinent to the proceeding against me, all of such information was and is tainted with illegality from its inception, and should likewise be suppressed.

Your deponent respectfully submits,

that:

- (a) An Order be made herein, suppressing the use as evidence against your deponent in the proceeding herein, of the aforesaid asserted "tablets containing acid diethylamide", referred to in Count Nine of the Indictment, as well as a Note book and any other personal property seized by the Government's Agents as a result of the aforesaid search and seizure.
- (b) That it be determined that the aforesaid arrest of your deponent, and the aforesaid search and seizure, was and is violative of your deponent's Constitutional rights.
- (c) That, by virtue of the illegalities in the aforesaid non-warrant arrest, search and seizure, the Indictment herein should be dismissed, as against your deponent.
- (d) That, the violation of Section 3107, Title 18 U.S.C., by the Government Agents, vitiated the aforesaid arrest, search and seizure.
- (e) That, under the facts and circumstances herein, this Honorable Court should inspect the Grand Jury Minutes, to determine if any other or competent evidence evidence, was before the Grand Jury, on which the Indictment herein, as against your deponent, was based.
- (f) That, any and all "leads" or information, pertinent to the charges against your deponent, if derived from the aforesaid illegal arrest, search and seizure, be determined to be tainted from its inception as a result of such illegality, and should be suppressed.
- (h) That your deponent have such other, further and different relief as may be just and proper in the premises,

and for all of which no previous application has been made.

Sworn to before me this
26th day of March, 1974.

GEORGE H. PARKER
Notary Public, State of New York

George H. Parker

*Joseph Raymond
Wangler*

THE COURT: The decision of the Court on the motion to suppress is as follows:

The defendant Joseph Raymond Wenzler has moved pursuant to Rule 41-E of the Federal Rules of Criminal Procedure for an order suppressing the use as evidence against him in the proceedings herein certain property set forth in the notice of motion briefly summarized as contraband; a notebook and all other property, if any, and from the said defendant's apartment located at 416 East 9th Street, New York City, on February 12, 1974, and for an order suppressing the use thereof as evidence against said defendant in these proceedings and for an order suppressing the use as evidence of any leads derived by the government from such personal property.

The application is further pursuant to Rule 12 of the Federal Rules of Criminal Procedure for an order dismissing the indictment on the ground allegedly that there was an illegal arrest of the defendant.

The motion finally requests that the Court inspect the minutes of the grand jury and requests a dismissal of the indictment on the ground that the grand jury received incompetent evidence resulting from the asserted illegal arrest, search and seizure.

The motion was supported by an affidavit of the

given without coercion either by explicit or implicit means, and was not generated through implied threat or covert force, nor was there any involuntary submission to authority. There is no credible evidence of any inherently coercive tactics.

The agents' testimony that they read to this defendant and explained his Miranda rights and that he knew all about them, that he stated that he knew all about them seems vindicated by the evidence on this hearing.

The defendant's testimonial version of the arrest and the search are not worthy of belief, and indeed they pose substantial discrepancies from the sworn statement contained in the affidavit of the defendant of March 26th, 1974 in support of the motion to suppress.

It seems conceded on the record that if there was any notebook involved taken by the government's agents from the defendant's apartment, that that is now back in his possession. The property in the possession of the government has been identified and may properly be retained by the government and utilized for the purposes of this case.

Accordingly, the motions are disposed of as indicated. Suppression is denied. And the motion to dismiss the indictment-- motions to dismiss the indictment are denied.

So ordered.

...

defendant Joseph Raymond Wenzler, sworn to March 26, 1974.

The Court ordered a hearing and an evidentiary hearing has been had and has been concluded this day.

And due deliberation having been had thereon, the Court finds and decides that based on the evidence, including the demeanor evidence and evaluating all of the evidence and circumstances in the record, the Court finds that the government has amply sustained its burden of proof, that the defendant was arrested on sufficient probable cause, and that the defendant invited and consented to the entry into the apartment of the government agents and thereafter consented to the search which disclosed the contraband.

The agents were lawfully on the premises, having been invited to enter therein by the defendant Wenzler, who voluntarily led the agents to the place where the drugs were located in the apartment, pointing out the night table which he voluntarily consented could be searched by the agents, and their search yielded the contraband.

The consent that was given for the search was given by a 26, now a 27-year old college-educated person possessing an evident conscious, intelligent understanding of the circumstances on the occasion in question and of what he was doing.

And that consent was freely, if not rather casually

MEMORANDUM ENDORSEMENT, DATED
April 11, 1974, made by Honorable
Milton Pollack, District Judge,
Denying Appellant's Suppression
Motion.

74CR 188

ENDORSEMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK.

- - - - -X

UNITED STATES OF AMERICA

v.

WILLIAM BRANDT, JOSEPH RAYMOND
WENZLER, et. al.

Defendants.

- - - - -X

After an evidentiary had and concluded
herein this day, and due deliberation having been had
thereon, it is

ORDERED that the within Motions are
denied in all respects. There was probable cause for the
arrest, and the search yielding the contraband was voluntarily
consented to by the defendant, a college educated person.
There is no evidence of any inherently coercive or unfair
tactics on the part of the arresting officers.

SO ORDERED
4/11/74

MILTON POLLACK
U.S. DISTRICT JUDGE

CHARGE OF THE COURT

(Pollack, J.)

Ladies and gentlemen of the jury, we have now reached the concluding phase of the trial. I want to express to you the thanks of the Court for your faithful attendance, patience and close attention to the case. You have now heard and received all of the evidence on which the case is to be decided, and through the arguments of the respective counsel you have learned the conclusion which each party believes should be drawn from the evidence presented to you.

In this charge I shall outline the principles of law which will be your guide in your deliberations. It is your duty to accept these instructions on the law as they are given to you by me, whether you agree with them or not. On the other hand, it is your exclusive function to determine the facts on the basis of your consideration of the evidence. As exclusive judges of the facts, your decision thereon is final and conclusive. Applying my instructions on the law to the facts as you find them, you will decide whether the defendant on trial before you is guilty or not guilty of the charges made against him or any of them.

The indictment in this case names nine persons

JG 2

1 as defendants. When the jury was selected, you were intro-
2 duced to counsel and the defendants. However, only five
3 remain on trial before you. They are the only persons as
4 to whom you will render a verdict, although, as I will
5 explain to you shortly, in considering whether any of them
6 are guilty, that is, any of the five are guilty or not
7 guilty, you may have to determine the nature of the partici-
8 pation, if any, of the other named defendants not now
9 before you.
10

11 During the course of the trial there was
12 evidence indicating that others than the defendants now
13 before you were allegedly involved in one way or another
14 with the activities which are the subject of the indictment.
15 I charge you that the fact that other people allegedly
16 involved are not now on trial before you is to play no role
17 in your deliberations as to the five before you except to
18 the extent that I have mentioned. No inference favorable
19 or unfavorable to either side or to any individual defendant
20 may be drawn from the fact that other people are not on
21 trial before you. It must not affect your deliberations
22 in any way with respect to whether a defendant who is on
23 trial is guilty or not guilty of the offenses charged against
24 him.
25

Eight counts, or charges, of the indictment will

1
2 be submitted for your verdict. Each count charges the
3 person or persons named therein with a separate offense or
4 crime. Each must be considered separately and each defend-
5 ant must be separately considered.
6

7 In substance, the first count charges all five
8 defendants who are before you with wilfully and knowingly
9 conspiring among themselves and with the other named
10 defendants to violate the federal drug laws. The second,
11 third, fourth, fifth, sixth, eighth and ninth counts -- you
12 will note that I omitted seven, because that is not before
13 you -- those counts are the ones which you will consider,
14 and they charge the persons named therein with actually
15 distributing or possessing with intent to distribute -- and
16 I'm going to say these chemical terms once and thereafter
17 refer to them only by initials -- lysergic acid diethylamide,
18 that is LSD, or phencyclidine, PCP, as the case may be.
19

20 These substantive counts, or these counts
21 beginning with number two, are referred to as substantive
22 counts to distinguish them from the conspiracy count. The
23 conspiracy charge is a charge of scheming, plotting or
24 agreeing to commit offenses. The substantive counts are
25 based on actual commissions, carrying out of such alleged
offenses.

I shall first mention certain general principles

JG 4

of law which apply to this as well as to every jury trial of a criminal case. A criminal case is initiated when a grand jury issues an accusation against the defendants it names on the basis of probable cause to believe that a crime was committed. It is not the function of a grand jury to determine whether the defendant named by it is guilty or not guilty. That is the function of a trial jury, like yourselves. Consequently, the indictment so filed is not to be taken by the trial jury as any evidence whatsoever on the charges made therein. It is not evidence that the crime was committed. It is a charge.

When the five defendants came before the Court in response to the indictment, each pleaded not guilty to the charges against him. Under our system of law a defendant is presumed to be innocent and he carries that presumption throughout the trial and until the jury is persuaded that the Government has proved the defendant's guilt beyond a reasonable doubt, a term which I will explain to you in a few moments.

Under the law, a defendant does not have to prove his or her innocence or submit any evidence at all. He is presumed to be innocent. The presumption of innocence is a conclusion drawn by the law in favor of the citizen by virtue of which he must be acquitted of a criminal charge

1 unless he is proven to be guilty beyond a reasonable doubt.
2 In other words, this presumption is an instrument of proof
3 created by the law in favor of one accused whereby his
4 innocence is established until sufficient evidence is intro-
5 duced to overcome the proof the law has created.
6

7 The evidence that has been admitted is the only
8 source from which the facts are to be drawn and from which
9 factual inferences are to be drawn. You will recall that
10 on occasion questions have been asked, some carrying implica-
11 tions, but objections were sustained, blocking answers to
12 the questions. At times answers were given to questions
13 and the answers were ordered stricken from the record.
14 Such unanswered questions and innuendoes therefrom, if any,
15 and stricken answers must be disregarded. They are not
16 evidence in the case.

17 The form of an unanswered question and any
18 atmosphere or innuendo suggested by it are to be ignored.
19 They are not evidence in the case. Courtroom exclamations
20 off the witness stand are not evidence in the case, nor are
21 apologies evidence in the case. As I have repeatedly said
22 to you, what has been said in your hearing by any person
23 other than a witness or said or exclaimed by the lawyers for
24 either side or even by the Court heretofore or in this
25 charge in relation to the facts is not evidence. Your memory

1 JG 6

2 of the evidence is what must govern you in the determination
3 of the case.

4 Counsel have given you their viewpoints. I
5 may refer to some of the evidence. However, it is your
6 recollection of the evidence and your judgment of the facts
7 that controls. It is for you to determine the weight that
8 will be given to the evidence, the credibility that you
9 will extend to the witnesses who testify, and the reasonable
10 inferences that are to be drawn from the evidence that has
11 been received.

12 There are two kinds of evidence recognized and
13 admitted in courts of justice on either one of which you
14 may find an accused guilty of a crime. One is called direct
15 evidence and the other is called circumstantial evidence.
16 Direct evidence is evidence which frequently is adduced by
17 testimony of an eye witness or a participant and tends to
18 show a fact in issue without need for any further amplifica-
19 tion. Of course, there is always a question of whether it
20 is to be believed.

21 Circumstantial evidence, on the other hands, is
22 indirect. It is proof of a chain of circumstances pointing
23 to the existence or non-existence of certain facts. There
24 must, however, be positive proof of some fact which affords
25 a basis, a starting point from which a reasonable inference

JG 7

may be drawn of the fact to be inferred.

Circumstantial evidence is that evidence which tends to prove a fact in issue by proof of other facts which have a legitimate tendency to lead the mind to infer that the facts sought to be established are true. Let me give you an example to illustrate just what I have said.

Suppose when you came into the building this morning the sun was shining brightly outside and you came into this courtroom. And suppose you found the blinds were drawn so that you couldn't see what the weather was like during the rest of the day. As you were sitting here during the course of the day in walks a person with an umbrella dripping and with a raincoat dripping. You haven't seen any rain outside. But from the circumstances of the person walking in with a dripping umbrella and a dripping raincoat it is reasonable for you to infer the further fact that it is raining outside although you can't see it.

That's what circumstantial evidence is. It consists of facts proved from which the jury may infer by a process of reasoning other facts in issue. It is not necessary that the participation of the defendant be shown by direct evidence. Connection may be inferred from such facts and circumstances and evidence as legitimately tend to sustain the inference.

1
2 In this case each side has produced both direct
3 and indirect, or circumstantial, evidence. The Government
4 contends that its evidence establishes each defendant's
5 guilt on each charge. Each defendant contends that no
6 evidence has overcome the presumption of innocence and that
7 at least there is a reasonable doubt of his guilt.

8 The law permits you to consider what may be
9 termed as negative evidence. This refers to the absence of
10 some fact or circumstance which could reasonable be expected
11 to have occurred. If some act, statement or event could
12 reasonably be expected to follow some prior event, act,
13 statement or occurrence and there was no evidence that it
14 did, then you may consider its absence in determining the
15 strength of the proof submitted to you.

16 You will apply to all the evidence the same
17 standard of proof. The Government must satisfy you of the
18 guilt of the defendant beyond a reasonable doubt on every
19 essential element of the offense being considered or else
20 you must acquit the defendant of the offense charged.
21 However, the Government is not required to prove guilt
22 beyond every possible doubt, nor to an absolute certainty.
23 Such a measure of proof is usually impossible and is not
24 required. By reasonable doubt we don't mean just any old
25 doubt. By reasonable doubt we mean a doubt which is

1 JG 9
2 sufficient to cause a prudent person to hesitate to act in
3 a matter of importance to himself or herself.
4

5 If the evidence which you believe is such as
6 would induce a prudent person to act without hesitation in
7 a matter of importance to himself or herself, then you may
8 say you have been convinced beyond a reasonable doubt. If,
9 on the other hand, your mind is wavering or uncertain to the
10 point where you have a doubt that would cause a prudent
11 person to hesitate in a matter of importance to him or her,
12 then you have not been convinced beyond a reasonable doubt.

13 Speculative notions or possibilities resting
14 upon mere conjecture not arising or deducible from the proof
15 should not be confounded with a reasonable doubt. A doubt
16 suggested by the ingenuity of counsel or by your own ingen-
17 uity not legitimately warranted by the evidence or the want
18 of it, or one born of a merciful inclination to permit the
19 defendant to escape the penalty of the law, or one prompted
20 by sympathy for him is not what is meant by a reasonable
21 doubt.

22 Reasonable doubt, as that term is employed in
23 the administration of a criminal law, is an honest, substan-
24 tial misgiving generated by the proof or want of it. It is
25 such a state of the proof as fails to convince your judgment
and conscience and satisfy your reason of the guilt of the

1 JG 10
2 accused of the particular charge considered.
3

4 If the whole evidence when carefully examined,
5 weighed; compared and considered produces in your minds a
6 subtle conviction or belief of the defendant's guilt, such
7 an abiding conviction as you would be willing to act upon
8 in the most weighty and important affairs of your own life,
9 you may be said to be free from any reasonable doubt and
10 should find the verdict in accordance with that conviction
11 or belief.

12 In the determination of whether a defendant is
13 guilty or not guilty, you must bear in mind that guilt is
14 personal. Whether a particular defendant is guilty or not
15 must be determined by the jury beyond a reasonable doubt
16 solely by the evidence introduced as to the particular
17 defendant or the lack thereof and from the reasonable infer-
18 ences that may flow from the direct and circumstantial evi-
19 dence as to the particular defendant, and that determination
20 must be made on the evidence relating to the particular
21 defendant and nothing else.

22 You must make your own evaluation of the evidence,
23 including the testimony given by each of the witnesses, and
24 determine the degree of weight you choose to give to such
25 evidence. It is for you to determine from the evidence and
demeanor on the stand of a witness, particularly on material

1 JG 11
2 matter related to the charges, whether or not he has given
3 truthful, reliable testimony or unintentionally or otherwise
4 embroidered the truth, falsified, exaggerated or suppressed
5 material facts and thus given an unreliable story.

6 In evaluating the testimony, whoever the witness
7 may have been, you may consider the interest or lack of
8 interest of the witness in the outcome of the case, the bias
9 or prejudice of the witness if you find that he had one,
10 the appearance, the manner in which the witness gave his
11 testimony on the stand, the opportunity that the witness had
12 to observe and note the facts concerning which he testified,
13 the probability or improbability of the witness' testimony
14 when viewed in the light of all the evidence in the case.
15 Those are all items to be taken into consideration in
16 determining the weight, if any, that you will assign to
17 that witness' testimony.

18 The testimony of a witness may fail to conform
19 to the facts as they occurred because the witness is inten-
20 tionally telling a falsehood or because the witness did not
21 accurately see or hear that about which the witness testified
22 or because his recollection of the event is faulty, or even
23 because the witness has not expressed himself or herself
24 clearly in giving the testimony.

25 You are entitled to consider the possibility that,

1 JG 12
2 when a witness is called upon to testify well after the
3 event and at great length, inconsistencies may be the result
4 of an innocent mistake or lapse of memory rather than of a
5 deliberate intention to falsify or change the facts. In
6 short, it is not unusual for a witness in a lengthy proceed-
7 ing to utter inconsistencies at some stage along the line.

8 If your consideration of the evidence makes it
9 appear that there were differing versions of the facts
10 resulting in a discrepancy of the evidence, you may, if you
11 wish, consider whether or not the apparent discrepancy
12 involved, ~~an understandable error~~ and can be reconciled by
13 fitting the two stories together in a rational relationship.
14 In other words, in passing on all issues of credibility you
15 determine the degree and the extent to which you accept or
16 reject the testimony.

17 You may, if you wish, accept so much of the
18 testimony of a witness as you may deem the truth and disre-
19 gard what you feel is faulty or mistaken or unclear. You
20 are at liberty, if you deem it proper under all the circum-
21 stances to do so, to disbelieve testimony in whole or only
22 in part even though it is not otherwise impeached or contra-
23 dicted.

24 If you find that any witness has wilfully testi-
25 fied falsely as to any fact material to the case that you are

1 considering, the law permits you to disregard completely
2 the entire testimony of that witness on the principle that
3 one who testifies falsely about one material fact is quite
4 likely to testify falsely about everything. However, here
5 again you are not required to consider such a witness as
6 totally unworthy of belief.
7

8 A witness who has given false testimony may also
9 have given credible evidence. You may, if you wish, accept
10 so much of his testimony as you believe true and reliable
11 and disregard what you feel is false or unworthy of accept-
12 ance.

13 The defendants did not testify in their own
14 behalf, and our law says the defendant may or may not take
15 the stand. The fact that a defendant did not testify cannot
16 be considered by you as any evidence against him or form a
17 basis for any presumption or inference unfavorable to him.
18 You must not permit such fact to weigh in the slightest
19 degree against such a defendant, nor should it enter into
20 your discussions or deliberations.

21 In order to return a verdict on any count as to
22 any defendant, each juror must agree on the particular find-
23 ings as to the particular defendant. That is, the finding
24 must be unanimous. The form of your report will be that
25 you find the defendant guilty or not guilty of the particular

JG 14

charge that you are considering. I will give you a suitable form which names each defendant who is now before you and identifies the counts in the indictment against that defendant that you are to consider, with appropriate columns for recording your vote. Each defendant is entitled to have determined whether he is guilty or not guilty as to each of the crimes charged, determined from his own conduct and from the evidence which applies to him as if he were being tried alone.

Whether any one defendant is guilty or not guilty of any of the crimes charged should not influence your verdict respecting the other defendants. The jury may find any one or more of the defendants guilty or not guilty on one or more counts.

You will have an opportunity to call for and read the indictment yourselves, so I will not read it in detail to you, but I will give you the points in the indictment.

Count one of the indictment charges conspiracy to violate certain federal laws. The essence of the crime of conspiracy is the scheme or plot, understanding or agreement to violate other laws. It makes no difference whether the scheme was successful or whether it failed of its purpose. It is still punishable as a crime. Consequently, on a

1 JG 15

2 controlled substances conspiracy charge, there is no need
3 to prove an actual violation of the federal drug laws. It
4 is enough that there was a criminal plan.

5 The conspiracy statute, Section 371 of Title 18
6 of the United States Code, provides in pertinent part as
7 follows:

8 "If two or more persons conspire to
9 commit any offense against the United States
10 and one or more of such persons does any
11 act to effect the object of the conspiracy, each
12 shall be guilty of a crime."

13 The comprehensive Drug Abuse Prevention Act of
14 1970 sets forth the law pertaining to controlled substances.
15 This law was passed by Congress because of a concern with
16 the illegal distribution of and possession with intent to
17 distribute the drugs named therein, which have a substantial
18 and detrimental effect on the health and welfare of our
19 people. The part of this Act which is applicable to the
20 charges h-re is called the Controlled Substances Act, which
21 became effective on May 1, 1971.

22 The term "controlled substances" is used in
23 the Act to refer to any drug included in one of the five
24 schedules contained in the Controlled Substances Act. LSD
25 is included in Schedule 1. THC, and I haven't given you

1 JG 16

2 the chemical name of that previously, is tetrahydracannabinol;
3 THC is included in Schedule II. I should say PCP is
4 included in Schedule III.

5 Among other things, the Act makes it unlawful
6 for any person to knowingly or intentionally distribute or
7 possess with intent to distribute any controlled substances
8 such as LSD or THC or PCP. In addition, any person who
9 conspires to commit any such offense commits a crime.

10 I remind you again that the conspiracy count,
11 as distinguished from the substantive counts, does not apply
12 to PCP, which, although it too is a controlled substance,
13 is a Schedule III drug, and the scheme, or the conspiracy,
14 charged here relates only to Schedules I and II drugs. The
15 only drugs that have been mentioned in the evidence that are
16 in Schedule I or Schedule II are LSD, THC and cocaine.

17 In order to prove the crime alleged in the first
18 count, that is, the criminal conspiracy, the Government must
19 establish several elements beyond a reasonable doubt. First
20 the proof must show a conspiracy during part or all of the
21 period from on or about November 1, 1973 until the indictment
22 in this case was filed on February 21, 1974. The Government
23 is not required to prove that the conspiracy began on the
24 specific day or ended on the specific day. Proof that the
25 conspiracy existed for a substantial portion of that period,

1 JG 17

2 even though it might be a relatively small part of that
3 period, would be sufficient.

4 Second, the Government has to prove that it was
5 part of the conspiracy to unlawfully violate the Controlled
6 Substances statute to which I have referred. Third, the
7 Government must prove that the defendant being considered
8 knowingly and wilfully became a participant in the conspiracy.
9 Fourth, the Government must prove that at least one alleged
10 coconspirator knowingly committed at least one alleged overt
11 act in furtherance of the conspiracy during the period of
12 its existence.

13 Now, I have spoken of overt acts. Under our
14 law it is not sufficient to constitute a crime to agree
15 mentally to an unlawful scheme, if no act occurs to carry
16 out some part in the conspiracy. Such an act is called an
17 overt act because it is an actual, an open, not a concealed
18 act. The overt acts claimed here are set forth in the
19 indictment and I will read them to you shortly.

20 If the Government has failed to establish beyond
21 a reasonable doubt each of the essential elements mentioned
22 as to any defendant, you must acquit that defendant on the
23 conspiracy charged. If, on the other hand, it has estab-
24 lished each such element beyond a reasonable doubt as to the
25 defendant you are considering, you will find that defendant

guilty.

What is a conspiracy? It is simply a combination or agreement or a scheme of two or more persons or concerted acts by two or more persons to accomplish a criminal, or unlawful, purpose. There have to be at least two people involved. You can't conspire with yourself. It is in essence a partnership in crime. The gist of the offense is the combination or agreement to violate the law. In this case the offense charged was violation of the federal drug laws, as I mentioned, in furtherance of which an overt act was committed, according to the indictment.

It is not necessary that a conspiracy be established by direct evidence, in order to convict. In fact, it can rarely be proved in that fashion for the reason that people seldom sit down and sign agreements to engage in an unlawful scheme or activity, much less to have them notarized or made known to the public. That type of conduct would be extraordinary.

your common sense will tell you that when men in fact undertake to enter into a criminal conspiracy, much is left to the unexpressed understanding. It is sufficient if two or more persons in any manner, impliedly or tacitly, come to a common understanding to violate the law. It is not necessary that the persons charged sit down and enter

1 into a formal agreement or that they state all the details
2 of their agreement or scheme or how it is to be effectuated.
3

4 A conspiracy is generally a matter of inference
5 to be drawn from the conduct of the persons charged. Actions
6 may often speak louder than words, and a defendant's partici-
7 pation in a conspiracy may be inferred from such facts and
8 circumstances in evidence as appear to you logically to
9 support or sustain such an inference. It is sufficient
10 if it be shown beyond a reasonable doubt that the defendant
11 and an alleged coconspirator came to a mutual understanding
12 to accomplish an unlawful act.

13 To determine whether a conspiracy existed you
14 piece together the independent evidence relating to each
15 alleged conspirator and determine, looking at the whole
16 picture, whether the acts, conduct and statements of at
17 least two of the alleged conspirators and the reasonable
18 inferences to be drawn from such acts, conduct and statements
19 establish to your satisfaction beyond a reasonable doubt
20 that there was a conspiracy.

21 If, for example, there was a concerted action
22 among several persons, with each of them doing something
23 unrelated to the act of the other, all of which contributed
24 in the same or similar manner toward the accomplishment of
25 some unlawful objective, such evidence would support the

1 JG 20

2 inference that those persons had conspired together to
3 accomplish that unlawful purpose. I call to your attention
4 that an unlawful scheme or agreement may exist even though
5 the individual alleged conspirators may have done some acts
6 in furtherance of a common unlawful purpose apart from and
7 even unknown to the others.

8 Although I have instructed you that it is not
9 necessary to prove that the parties ever came together and
10 entered into an informal agreement or arrangement between
11 themselves, I do not mean to imply or infer that a conspiracy
12 as alleged in the indictment in fact existed. As I previously
13 told you, that is not my function. That is the determination
14 of fact which you must make.

15 A conspiracy once formed is presumed to continue
16 until either its objective was accomplished or until there
17 is some affirmative act of termination by its members. A
18 conspiracy is not ended as long as the evidence shows an
19 intention to continue it. Such intention may be inferred
20 from activities of conspirators in furtherance of the unlaw-
21 ful purpose of the alleged conspiracy.

22 Once a person is found to be a member of a
23 conspiracy, he is presumed to continue his membership therein
24 until its objective was accomplished or there was some
25 affirmative act of termination by its members or until his

1 withdrawal. A conspirator has the right to discontinue his
2 or her participation in carrying out the alleged conspiracy,
3 but it will take affirmative action on his part thus to
4 withdraw and to terminate his liability for the future
5 activities of his partners.
6

7 Of course- such withdrawal does not relieve him
8 of responsibility for his prior membership in the alleged
9 conspiracy. As I have already said, an unlawful conspiracy
10 may exist even though its purposes are not accomplished,
11 but evidence that its purposes were accomplished, such as
12 proof of actual sales or distributions, may be considered
13 by you if you find that there is such evidence as proof
14 bearing on the existence of the conspiracy.

15 If you find that the alleged conspiracy as
16 charged in the indictment did exist, you must focus your
17 attention next and separately on each defendant to determine
18 whether the defendant knowingly and wilfully became a member
19 of the conspiracy. Of course, if you find that no conspir-
20 acy existed, that would end the consideration of count one
21 and it would be unnecessary for you to consider any other
22 factors.

23 To determine whether a defendant was a member
24 of the alleged conspiracy you ask yourselves whether that
25 particular defendant acted wilfully and with knowledge that

2 his acts were an integral part of the unlawful enterprise
3 and to help carry it forward as an associate or worker in it.
4 You must find that the defendant knew what the unlawful
5 purpose was and had a stake, or a personal interest, in it
6 as distinguished from acting exclusively on his own.

7 It is not necessary that a defendant be fully
8 informed as to the details or the full scope of the alleged
9 conspiracy in order to justify an inference of knowledge on
10 his part, nor need he even know all the alleged conspirators.
11 The guilt of an alleged conspirator is not measured by the
12 extent or duration of his alleged participation. Even if
13 he participated to a degree more limited than that of his
14 coconspirators or in a subordinate or a minor way relatively,
15 he is equally culpable so long as he was in fact a conspira-
16 tor.

17 The scope of each defendant's agreement must be
18 determined individually from what was proved as to that
19 defendant. In order for a defendant to be held for joining
20 others in an alleged conspiracy he must in some sense promote
21 the venture himself, make it his own. To do this you must
22 determine what each conspirator is promoting and making his
23 own. A single act may be the basis for drawing an actor
24 within the ambit of an alleged conspiracy. But since
25 conviction of conspiracy requires an intent to participate

in the unlawful enterprise, the single act must be such that one may reasonably infer from it such an intent.

Stated another way, proof of participation in a single isolated controlled substances transaction standing alone is insufficient to warrant conviction of conspiracy when there is no independent evidence tending to prove that the defendant had some knowledge of the broader conspiracy and an intention to participate therein, that is, when the single transaction is not in itself one from which such knowledge and intent may be inferred.

I want to call to your attention that mere association with one or more of the alleged conspirators does not make one a member of the alleged conspiracy, nor is knowledge without participation sufficient. A mere witness participation and acts with alleged conspirators, knowing in a general way that their intent was to break the law, is, if standing alone, insufficient to establish an individual's own participation in a conspiracy. There must be participation in the alleged conspiracy with an intent to further the common purpose or design. In short, a person becomes a member of an alleged conspiracy by associating himself, even though informally, with a common plan or scheme by participating, knowing the general aim or purpose, and intending to aid in bringing about the plan or scheme.

1
2 All conspirators or alleged conspirators need
3 not have originally or simultaneously conceived the alleged
4 conspiracy or participated in it in its inception. In
5 order to be guilty, one who comes in later with the knowledge
6 of the means and purposes, although not necessarily of the
7 details, and who intentionally cooperates in a common effort
8 to gain the unlawful result, may become a member of the
9 alleged conspiracy equally with the alleged conspirators
10 and he is legally responsible for the purposes of the
11 conspiracy count for all of the acts done by any of the
12 other members before or afterwards in furtherance of the
13 common objective, just like any partner who is a member of
14 a partnership agreement.

15 The acts or statements of one alleged coconspira-
16 tor may be considered by you as evidence against other
17 alleged coconspirators only if you find that the statements
18 and acts were spoken and done during the continuance of the
19 alleged conspiracy and in aid of and in furtherance of the
20 purpose of the alleged conspiracy. You must be satisfied
21 beyond a reasonable doubt that a conspiracy existed and that
22 the defendant joined the conspiracy before you can regard
23 the act of any defendant as being in furtherance of the
24 conspiracy alleged in this indictment.

25 The status of the partner, manager or supervisor

1 JG 25

2 or worker, his participation in key conversations or trans-
3 actions, his participation in the alleged plan, scheme or
4 agreement must be considered. You must find beyond a
5 reasonable doubt that he did in fact join the alleged
6 conspiracy with knowledge of its unlawful purpose and
7 intended to aid and assist in accomplishing that purpose.

8 This intent may be inferred from his acts and
9 declarations and no direct proof is necessary. In sum, the
10 participation of a defendant must be established by his own
11 actions, by his own statements and declarations, by his
12 own knowledge or lack of knowledge or by his own connection
13 with the acts and statements of other alleged coconspirators.

14 It is contended here that the Government has
15 failed to prove the existence of only one alleged conspiracy
16 but has proved several separate and independent alleged
17 conspiracies involving various of the defendants. Proof
18 of several separate and independent conspiracies is not
19 proof of the single overall conspiracy as charged in the
20 indictment, and if you find that the Government has failed
21 to prove the existence of only one conspiracy you must find
22 the defendants not guilty on the conspiracy count.

23 In determining whether there was a single overall
24 conspiracy you may consider what the evidence shows as to
25 the time, parties or objects and changes of personnel and

activity. You may find a single conspiracy even though there were changes in personnel and activities, providing you find that some of the coconspirators continued throughout the life of the alleged conspiracy and that the purposes of the alleged conspiracy continued to be those charged in the indictment.

The fact that the parties are not always identical does not mean that there are separate conspiracies. In other words, if at all times the alleged conspiracy had the same overall primary purpose and the same nucleus of participants, the alleged conspiracy would be the same basic scheme even though in the course of its operation additional alleged conspirators joined in and performed functions to carry out the scheme while others were not active or had terminated their relationship.

On the other hand, if you find that one overall conspiracy terminated and another one was formed, you may not find a single conspiracy even though the purposes of both conspiracies were the same and that some of the defendants were members of both. In essence, therefore, the question is what is the nature of a scheme or agreement. That is for you to determine after examining all the evidence.

Thus, to summarize my discussion of the third question, whether a defendant was a member of the alleged

1
2 conspiracy, whether you find that a violation of the statute
3 was sought to be accomplished and two or more persons
4 actuated by a common purpose of accomplishing that end
5 knowingly worked together in any way in furtherance of the
6 unlawful scheme, every one of such persons becomes a member
7 of the alleged conspiracy even though his part in it may
8 be separated in time from the activities of his coconspirators.
9

10
11 If you find that the alleged conspiracy existed
12 and that the particular defendant as to whom the charges are
13 being considered by you was a member, you reach the fourth
14 and final step, and that is that you must determine whether
15 one or more members of the alleged conspiracy, not necessarily
16 the particular defendant you are considering, has committed
17 one or more of the overt acts alleged in the indictment to
18 have been committed in furtherance of some object or purpose
19 of the alleged conspiracy and that it was committed in
20 furtherance of that act, object or purpose.

21 The object of the conspiracy is complete when
22 the unlawful agreement is made and any single related overt
23 act in furtherance of it is done by one of the alleged
24 coconspirators. Thereafter an act done by any one of the
25 alleged conspirators in furtherance of the alleged conspiracy
becomes an act by all members of the illegal partnership.

Of course, an overt act by anyone who is not a member of the alleged conspiracy would not apply.

What is an overt act? An overt act is an open act or step or action or conduct taken to achieve, accomplish or further the objectives of the alleged conspiracy. The purpose of requiring proof of an overt, or open, act is to assure that, where parties have conspired and agreed to do some unlawful thing but that they have changed their minds and abandoned the project or have done nothing at all to carry it out, they will not be charged with a crime.

The prosecution, on the other hand, is not required to set forth in the indictment each and every act on which it relies to establish the alleged conspiracy or on which it relies to establish each defendant's participation in such conspiracy. Nor is the prosecution required to prove each overt act which may have occurred during and in furtherance of such conspiracy. It is required to prove, however, that at least one such act did take place. The overt act need not be a criminal act in and of itself, nor need it be the crime which is the object of the alleged conspiracy. It may consist of the holding of a meeting or the like, providing the act was to further the objective of the alleged conspiracy.

Turning to the alleged overt acts, the real

question that you have to decide, if you reach that point, is whether any of these open acts occurred in furtherance of the alleged conspiracy. This is fully a question of intent with respect to the people alleged to have committed them.

The Government contends that one or more of the following overt acts, among others charged in the indictment, were committed as stated therein. The indictment reads:

"In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

"On or about November 27, 1973, defendants William Brandt, David Ross Miley and John Godinsky sold a quantity of LSD for \$650.

"On or about December 13, 1973, defendant William Brandt went from the Village Plaza Hotel, 79 Washington Street, New York, N. Y., to the vicinity of Avenue A and East 11th Street.

"On or about December 13, 1973, defendants William Brandt, David Flores and Dean Peter Vavarigos had a meeting in apartment 4A, 501 East 11th Street, New York, N. Y.

"On or about December 13, 1973, defendants William Brandt, David Flores and Dean Peter Vavarigos sold a quantity of PCP for \$1800.

"On or about January 3, 1974, defendant John Godinsky went from the area of the Village Plaza Hotel, 79 Washington Street, New York, N. Y. and proceeded to the area of West 4th Street and Bowery Street.

"On or about January 3, 1974, defendants William Brandt, David Ross Miley and John Godinsky sold a quantity of LSD for \$1925.

"On or about January 10, 1974, the defendant Dean Peter Vavarigos gave away a quantity of PCP as a sample.

"On or about January 15, 1974, the defendants William Brandt, Jan Lang and Joseph Raymond Wenzler sold a quantity of LSD for \$1200.

"On or about February 12, 1974, the defendants William Brandt, David Ross Miley and Robin Bachia sold approximately 1800 dosage units of LSD for \$660.

"On or about February 12, 1974, Robin Bachia transported to the area of Third Avenue and St. Marks Place approximately 10,000 dosage units of LSD."

That completes the discussion of the conspiracy count. I will now turn to the essential elements of the substantive counts, numbers 2, 3, 4, 5, 6, 8 and 9.

Before you can find the named defendants guilty of the crimes charged in those counts in this indictment you must be convinced and find beyond a reasonable doubt as to

the count and the defendant you are considering that the Government has proved the following essential elements:

First, that on or about the dates set forth in each count the defendant or defendants named in that count distributed or actually or constructively possessed with intent to distribute the controlled substance drug named in that count. It is sufficient if you find either distribution or possession with intent to distribute.

Second, that he did so unlawfully, wilfully and knowingly. Third, that the substance alleged in the respective count was in fact a controlled substance drug.

The word "distribute" means the actual or constructive or attempted transfer of a drug. The word "possess" has its common everyday meaning - that is, to have something within your control. And to have something within your control does not necessarily mean to have it in your hands or pocket. Control may be demonstrated by the existence of a working relationship between the person having such control and the person with actual physical custody.

The word "intent" refers to a person's state of mind, so the term "possess with intent to distribute" can be fairly stated to mean to control an item with a state of mind or a purpose to transfer that item or to cause it to be transferred.

1 The proof of actual possession is not necessary
2
3 to sustain a conviction for violation of the statutes
4 involved. Constructive possession is sufficient. Such
5 possession need not be exclusive but may be shared with
6 others. Moreover, it may be proved by circumstantial as
7 well as by direct evidence.

8 Mere presence in the area where a controlled
9 substance drug is discovered or the mere association with a
10 person who controls the drug or the property where it is
11 located is insufficient to support a finding of possession.
12 If you find beyond a reasonable doubt that the transfer is
13 alleged to have been made, I charge you that each such
14 transfer satisfies this requirement of the statute.

15 As to the second element, the terms "unlawfully,
16 wilfully and knowingly" mean that you must be satisfied
17 beyond a reasonable doubt that the defendant knew what he
18 was doing and that he did it deliberately and voluntarily as
19 opposed to mistakenly or accidentally or as a result of some
20 coercion.

21 Of course, it is not necessary that the defendant
22 knew he was violating any particular law. Rather, it is
23 sufficient if you are convinced beyond a reasonable doubt
24 that he was aware of the general unlawful nature of his
25 acts. Knowledge and intent exist in the mind. Since it is

not possible to look into a man's mind to see what went on in it, the only way you have of arriving at a decision on these questions is for you to take into consideration all the facts and circumstances shown by the evidence, including the exhibits, and to determine from all such facts and circumstances whether the requisite knowledge and intent were present at the time in question. Direct proof is unnecessary. Knowledge and intent may be inferred from all the surrounding circumstances. As far as intent is concerned, you are instructed that a person is presumed to intend the natural and probable or ordinary consequences of his acts.

As to the third element, the indictment charges that the controlled substance is either LSD or PCP. I instruct you as a matter of law that each of those is a controlled substance. You, however, must still find beyond a reasonable doubt that the substances charged in the substantive counts to have been distributed were LSD or PCP.

There is a stipulation before you to the effect that if a chemist were called to the witness stand he would testify that the substances referred to in the evidence on the substantive counts were in fact LSD or PCP.

I have now reviewed the elements of the substantive counts that the Government must prove beyond a reasonable doubt before you can find that the defendant is guilty on

1
2 those counts. There is, furthermore, another method by
3 which you should evaluate the evidence and which would
4 sustain a finding of guilt of the defendant charged on the
5 substantive counts, even though the Government's proof on
6 the substantive counts was not sufficient as to him to
7 establish all the required elements.

8 You will recall the instructions I've given you
9 as to the crime of conspiracy charged in the first count.
10 If you find, pursuant to those instructions, that a particu-
11 lar defendant was a conspirator and hence guilty under the
12 first count, you may find him guilty as well under a sub-
13 stantive count in the indictment, providing you find that
14 the crime charged in the substantive count was committed and
15 that it was committed during and in furtherance of the
16 conspiracy charged in the first count.

17 If he is a member of a conspiracy, just like a
18 partner he is criminally responsible for the substantive
19 crimes and may be found guilty of those. The reason for this
20 is that his coconspirator committing the substantive crimes
21 is the agent of the other members of the alleged conspiracy.
22 However, if the particular defendant was not a member of
23 the alleged conspiracy or if the crime charged in the sub-
24 stantive count was not committed during the pendency of the
25 alleged conspiracy, or if the crime charged in the substantive

count was not done in furtherance of the conspiracy, then you may not find the defendant guilty of the substantive count unless the Government has proved beyond a reasonable doubt, along with all the other elements I have given you, that the defendant did the acts charged in that particular substantive count or aided and abetted in the commission of the substantive crime.

In this connection, Section 2 of Title 18 of the United States Code provides that a person who aids, abets, counsels, commands, induces or procures the commission of an offense against the United States is as equally punishable as the person who commits the offense directly himself.

In order to aid and abet another to commit a crime it is necessary that a defendant in some sort associate himself with a venture, that he participate in it as in something that he wishes to bring about, that he seek by his actions to make it succeed. Knowledge that a crime is being committed, even when coupled with presence at the scene, is not enough to constitute aiding and abetting. Rather, it is required that an individual promote the venture himself, make it his own, have a stake in the outcome.

Much of the evidence adduced by the Government was adduced in support of the conspiracy count of the indictment. Much of the same evidence has also been

1 JG 36

2 produced in support of the substantive counts of the indict-
3 ment. If the evidence relates to and is connected up with
4 the conspiracy count and the substantive counts, there is
5 nothing inconsistent with using parts of the same evidence
6 to prove that a particular defendant committed a substantive
7 crime and also to prove that he was a member of a conspiracy.

8 You may also be asking yourselves whether the
9 same testimony as to the use of the evidence applies to
10 the substantive counts as to the conspiracy counts. Par-
11 ticularly you may be wondering whether, if you find that
12 all of the elements of the alleged conspiracy were present
13 as to two or more defendants, acts or declarations of one
14 alleged conspirator in furtherance of the alleged conspiracy
15 may be considered in determining the guilt or innocence of
16 the member defendants on the substantive counts.

17 The short answer to this question is yes.
18 Evidence of acts and declarations of one conspirator binding
19 on a confederate on an agency theory are not to be confined
20 to the conspiracy charge. Such evidence is also competent
21 to prove guilt of the substantive crime if you find that
22 there was a conspiracy in existence and that the defendant
23 was a member of it.

24 As I indicated previously, to convict on a
25 substantive count you must find beyond a reasonable doubt

1 JG 37
2 that the defendant acted unlawfully, wilfully and knowingly,
3 and I have already defined those terms for you.
4

5 Members of the jury, under your oath as jurors
6 you cannot allow any consideration of the punishment which
7 might be inflicted upon a defendant if convicted to influence
8 your verdict in any way or in any sense enter into your
9 deliberations. The duty of imposing sentence following
10 conviction rests exclusively upon this Court. That is
11 solely the Judge's responsibility. Your function is to
12 weigh the evidence in the case and to determine whether the
13 defendants are guilty or not guilty solely on the basis of
14 such evidence and the law.

15 You are not here to improvise the rules of law
16 or remake them by indirection or subtlety. You are honor
17 bound to administer the law as it stands. There can be no
18 debate in a jury room or in a juror's mind as to the wisdom
19 of the law. It would be a violation of your sworn duty to
20 disregard the law or fail to apply it to the facts in
21 evidence. This is neither a popularity contest or a
22 sympathy chamber. It is a hall in which each of us sworn
23 to uphold the law must do our duty regardless of how person-
24 ally distasteful that might be.

25 You are to decide the case upon the evidence
alone. You must not be influenced by any assumptions,

conjectures or inferences not warranted by the facts unless and until proved to your satisfaction.

In deliberating on this case I want you to listen to each other carefully in the jury room. If you think you are wrong and somebody else is right, do not be embarrassed about changing your mind. But, remember, each of you is to decide the case for yourself. You must bring in a verdict for or against the defendant in question on each count under which the defendant is charged, whether not guilty or guilty, and any verdict, as I have said before, to be acceptable must be unanimous as to a count on which you are reporting.

Use your common sense in evaluating the evidence and circumstances and probabilities. Do not allow yourselves to be swayed or carried away or inflamed by appeals to passion, sympathy or prejudice. Suspicion, conjecture should not be substituted for the evidence. You must maintain a clear view of the case and not be sidetracked by anything or anybody from a fair, dispassionate consideration of the evidence in arriving at your resolution of the facts in the case that you are not deciding.

The oath that you took at the outset, when you were sworn as jurors, really sums up what you are supposed to do in this case, and that is, without fear or favor to any party you will well and truly decide the issues according

1 JG 39 65-a
2 to the evidence and the law as stated to you by the Court.
3

4 If you desire any of the exhibits, those will
5 be sent to you in the jury room upon request. And, as I
6 have said, you may have a copy of the indictment if you
7 desire to have it. If you want any of the testimony read,
8 that can be done also. It is not easy to find the testimony
9 in the notes of the reporter. So, therefore try to be as
10 specific as you can in regard to any requests that you do
11 make.

12 Please do not communicate with anyone concerning
13 your deliberations about this case except in writing signed
14 by Miss Wolf, who will act as your forelady, unless you
15 choose another person. She will be provided with adequate
16 pencils and paper by the marshal.

17 Now I would like to take a few minutes to talk
18 to the lawyers. They may wish to call to my attention any
19 matter on which I may have misspoken or which I may have
20 overlooked. So, if you will just relax in the jury box,
21 I will talk to them.

22 Gentlemen, come up.

(At the side bar)

23 THE COURT: Are there any exceptions or requests
24 on the part of the Government?

25 MR. BATCHELDER: Yes, sir. I would request

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2 UNITES STATES OF AMERICA

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v.

3 DAVID ROSS MILEY, et al.

74 Cr. 188

4 CHARGE OF THE COURT

5 (Pollack, J.)

6 THE CLERK: The Court is about to charge the
7 jury. Any spectators wishing to leave the courtroom will
8 do so now or remain seated until the completion of the
9 Court's charge.

10 THE COURT: Ladies and gentlemen of the jury,
11 we have now reached the concluding phase of the trial.
12 I want to express to you the thanks of the Court for your
13 faithful attendance, patience and close attention to the
14 case.

15 You have now heard and received all of the
16 evidence on which the case is to be decided and through the
17 arguments of the respective counsel you have learned the
18 conclusion which each party believes should be drawn from
19 the evidence presented to you.

20 In this charge I shall outline the principles
21 of law which will be your guide in your deliberations.
22 It is your duty to accept these instructions on the law
23 as they are given to you by me whether you agree with them
24 or not. On the other hand, it is your exclusive function
25 to determine the facts on the basis of your consideration

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2 of the evidence.

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3 As exclusive judges of the facts, your decision
4 thereon is final and conclusive. Applying my instructions
5 on the law to the facts as you find them, you will decide
6 whether the defendant on trial before you is guilty or not
7 guilty of the charges made against him, or any of them.

8 The indictment in this case names nine persons
9 as defendants. When the jury was selected you were intro-
10 duced to counsel and the defendants. However, only five are
11 on trial before you. They are the only persons as to whom
12 you will render a verdict. Although as I will explain to
13 you shortly in considering whether any of them are guilty,
14 that is, any of the five are guilty or not guilty, you
15 may have to determine the nature of the participation,
16 if any, of the other named defendants not now before you.

17 During the course of the trial there was evidence
18 indicating that others than the defendants now before you
19 were allegedly involved in one way or another with the
20 activities which are the subject of this indictment. I
21 charge you that the fact that other people allegedly involved
22 are not now on trial before you is to play no role in your
23 deliberations as to the five before you, except to the
24 extent that I have mentioned. No inference, favorable
25 or unfavorable to either side or to any individual defendant,

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2 may be drawn from the fact that other people are not now
3 on trial before you. It must not affect your deliberations
4 in any way with respect to whether a defendant who is on
5 trial is guilty or not guilty of the offenses charged
6 against him.

7 Six counts or charges of the indictment will be
8 submitted for your verdict. Each count charges the person
9 or persons named therein with a separate offense or crime.
10 Each must be considered separately and each defendant
11 must be separately considered. Later on I will read
12 each count being considered from the indictment.

13 In substance, the first count charges all
14 five defendants who are before you with wilfully and
15 knowingly conspiring among themselves and with the other
16 named defendants to violate the federal drug laws. The
17 third, fourth, sixth, eighth and ninth counts, those counts
18 are the ones which you will consider, and they charge
19 the persons named therein with actually distributing or
20 possessing with intent to distribute or aiding and abetting
21 those things -- and I am going to say these chemical terms
22 once and thereafter refer to them only by initials --
23 lysergic acid diethylamide, that is LSD, or phencyclidine,
24 PCP, as the case may be.

25 The substantive counts or the counts beginning

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with number 3 are referred to as substantive counts to distinguish them from the conspiracy count. The conspiracy charge is a charge of scheming, plotting or agreeing to commit offenses. The substantive counts are based on actual commissions, carrying out of such alleged offenses.

I shall first mention several general principles of law which apply to this as well as to every jury trial of a criminal case..

A criminal case is initiated when a grand jury issues an accusation against the defendants named on the basis of probable cause to believe that a crime was committed. It is not the function of a grand jury to determine whether the defendant named by it is guilty or not guilty. That is the function of a trial jury, like yourselves. Consequently, the indictment so filed is not to be taken by the trial jury as any evidence whatsoever on the charges made therein. It is not evidence that the crime was committed, it is a charge.

When the five defendants came before the court in response to the indictment, each pleaded not guilty to the charges against him. Under our system of law, a defendant is presumed to be innocent and he carries that presumption throughout the trial and until the jury is persuaded, if it is, that the government has proved the

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defendants guilt behind a reasonable doubt, a term which I will explain to you in a few moments.

Under the law a defendant does not have to prove his or her innocence or submit any evidence at all. I will repeat that. Under the law a defendant does not have to prove his or her innocence or submit any evidence at all, he is presumed to be innocent. The presumption of innocence is a conclusion drawn by the law in favor of the citizen by virtue of which he must be acquitted of a criminal charge unless he is proven to be guilty beyond a reasonable doubt.

In other words, this presumption is an instrument of proof created by the law in favor of one accused whereby his innocence is established until sufficient evidence is introduced to overcome the proof the law has created.

The evidence that has been admitted is the only source from which the facts are to be drawn and from which factual inferences are to be drawn. You will recall on occasion questions have been asked, some carrying implications, but objections were sustained blocking answers to the questions. At times answers were given to questions and the answers were ordered stricken from the record. Such unanswered questions and innuendos therefrom, if any, and stricken answers must be disregarded. They are not

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evidence in the case.

The form of an unanswered question and any atmosphere or innuendo suggested by it are to be ignored. They are not evidence in the case. Courtroom exclamations, if any, off the witness stand are not evidence in the case nor are apologies evidence in the case. As I have repeatedly said to you, what has been said in your hearing by any person other than a witness or said or exclaimed by the lawyers for either side or even by the court heretofore or in this charge in relation to the facts is not evidence. Your memory of the evidence is what must govern you in the determination of the case.

Counsel have given you their viewpoints. I may refer to some of the evidence. However, it is your recollection of the evidence and your judgment of the facts that controls. It is for you to determine the weight that will be given to the evidence, the credibility that you will extend to the witnesses who testify and the reasonable inferences that are to be drawn from the evidence that has been received.

There are two kinds of evidence recognized and admitted in courts of justice, on either one of which you may find an accused guilty of a crime. One is called direct evidence and the other is called circumstantial

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2 evidence.

3 Direct evidence is evidence which frequently
4 is adduced by testimony of an eyewitness or a participant
5 or in a tape recording and tends to show a fact in issue
6 without need for any further amplification. Of course,
7 there is always a question of whether it is to be believed.

8 Circumstantial evidence, on the other hand,
9 is indirect. It is proof of a chain of circumstances
10 pointing to the existence or non-existence of certain facts.
11 There must, however, be positive proof of some fact which
12 affords a basis, a starting point from which a reasonable
13 inference may be drawn of the fact to be inferred. Cir-
14 cumstantial evidence is that evidence which tends to prove
15 a fact in issue by proof of other facts which have a
16 legitimate tendency to lead the mind to infer that the facts
17 sought to be established are true.

18 Let me give an example to illustrate just what
19 I have said.

20 Suppose when you came into the building this
21 morning, as it was, the sun was shining brightly outside
22 and then you came into this courtroom and suppose you found
23 the blinds were drawn so you couldn't see what the weather
24 was like during the rest of the day. As you were sitting
25 here during the course of the day in walks a person with

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2 an umbrella dripping and a raincoat dripping. You haven't
3 seen any rain outside, but from the circumstances of
4 the person walking in with a dripping umbrella and a
5 dripping raincoat it is reasonable for you to infer the
6 further fact that it is raining outside, although you
7 can't see it.

8 That is what circumstantial evidence is. It
9 consists of facts proved from which the jury may infer
10 by a process of reasoning other facts in issue. It is not
11 necessary that the participation of the defendant be shown
12 by direct evidence. The connection may be inferred from
13 such facts and circumstances and evidence as legitimately
14 tend to sustain the inference.

15 In this case each side has produced both direct
16 and indirect or circumstantial evidence. The government
17 contends that its evidence establishes each defendant's
18 guilt on each charge. Each defendant contends that no
19 evidence has overcome the presumption of innocence and
20 that at least there is a reasonable doubt of his guilt.

21 The law permits you to consider what may be
22 termed as negative evidence. This refers to the absence
23 of some fact or circumstance which could reasonably be
24 expected to have occurred. If some act, statement or event
25 could reasonably be expected to follow some prior event,

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2 act, statement or occurrence and there was no evidence
3 that it did, then you may consider its absence in determin-
4 ing the strength of the proof submitted to you.

5 You will apply to all the evidence the same
6 standard of proof. It is the government which must satisfy
7 you of the guilt of the defendant beyond a reasonable doubt
8 on every essential element of the offense being considered
9 or else you must acquit the defendant whom you are con-
10 sidering of the offense charged.

11 However, the government is not required to prove
12 guilt beyond every possible doubt nor to an absolute
13 certainty. Such a measure of proof is usually impossible
14 and is not required.

15 By reasonable doubt we don't mean just any
16 old doubt. By reasonable doubt we mean a doubt which is
17 sufficient to cause a prudent person to hesitate to act
18 in a matter of importance to himself or herself.

19 If the evidence which you believe is such that
20 would induce a prudent person to act without hesitation
21 in a matter of importance to himself or herself, then
22 you may say you have been convinced beyond a reasonable
23 doubt. If, on the other hand, your mind is wavering or
24 uncertain to the point where you have a doubt that would
25 cause a prudent person to hesitate in a matter of importance

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to him or her, then you have not been convinced beyond a reasonable doubt.

Speculative notions or possibilities resting upon mere conjecture not arising or deducible from the proof should not be confounded with reasonable doubt.

A doubt suggested by the ingenuity of counsel or by your own ingenuity not legitimately warranted by the evidence, or the want of it, or one born of a merciful inclination to permit the defendant to escape the penalty of the law or one prompted by sympathy for him is not what is meant by a reasonable doubt.

Reasonable doubt, as that term is employed in the administration of criminal law, is an honest misgiving generated by the proof or want of it. It is such a state of the proof as fails to convince your judgment and conscience and satisfy your reason of the guilt of the accused of the particular charge considered.

In the whole evidence, when carefully examined, weighed, compared and considered produces in your minds a conviction or belief of the defendant's guilt, such an abiding conviction as you would be willing to act upon in the most weighty and important affairs of your own life, you may be said to be free from any reasonable doubt and should find the verdict in accordance with that conviction

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or belief.

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In the determination of whether a defendant is guilty or not guilty you must bear in mind that guilt is personal. Whether a particular defendant is guilty or not must be determined by the jury beyond a reasonable doubt solely by the evidence introduced as to the particular defendant or the lack thereof and from the reasonable inferences that may flow from the direct and circumstantial evidence as to the particular defendant, and that determination must be made on the evidence relating to the particular defendant and nothing else.

You must make your own evaluation of the evidence, including the testimony given by each of the witnesses, and determine the degree of weight you choose to give to such evidence. It is for you to determine from the evidence and demeanor on the stand of a witness particularly on material matter related to the charges whether or not he has given truthful reliable testimony or unintentionally or other-wise embroidered the truth, falsified, exaggerated or suppressed material facts and, thus, given an unreliable story.

In evaluating the testimony, whoever the witness may have been, you may consider the interest or lack of interest of the witness in the outcome of the case,

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the bias or prejudice of the witness, if you find that he had one, the appearance, the manner in which the witness gave his testimony on the stand, the opportunity that the witness had to observe and note the facts concerning which he testified, the probability or improbability of the witness' testimony when viewed in the light of all the evidence in the case. Those are all items to be taken into consideration in determining the weight, if any, that you will assign to that witness' testimony.

The testimony of a witness may fail to conform to the facts as they occurred because the witness is intentionally telling a falsehood or because the witness didn't accurately see or hear that about which the witness testified or because his recollection of the event is faulty or even because the witness has not expressed himself or herself clearly in giving the testimony.

You are entitled to consider the possibility that when a witness is called upon to testify well after the event and at great length inconsistencies may be the result of an innocent mistake or lapse of memory rather than of a deliberate intention to falsify or change the facts. In short, it is not unusual for a witness in a lengthy proceeding to utter inconsistencies at some stage along the line.

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If your consideration of the evidence makes it appear that there were differing versions of the facts resulting in a discrepancy in the evidence, you may, if you wish, consider whether or not the apparent discrepancy involved is an understandable error and can be reconciled in fitting the two stories together in a rational relationship. In other words, in passing on all issues of credibility, you determine the degree and the extent to which you accept or reject the testimony.

You may, if you wish, accept so much of the testimony of a witness as you may deem the truth and disregard what you feel is faulty or mistaken or unclear. You are at liberty, if you deem it proper under all the circumstances to do so, to disbelieve testimony in whole or only in part even though it is not otherwise impeached or contradicted.

If you find that any witness has wilfully testified falsely as to any fact material to the case that you are considering, the law permits you to disregard completely the entire testimony of that witness on the principle that one who testifies falsely about one material fact is quite like to testify falsely about everything. However, here again, you are not required to consider such a witness is totally unworthy of belief.

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A witness who has given false testimony may also have given credible testimony. You may, if you wish, accept so much of his testimony as you believe true and reliable and disregard what you feel is false or unworthy of acceptance.

The defendants did not testify on their own behalf and our law says that a defendant may or may not take the stand. The fact that a defendant did not testify cannot be considered by you as any evidence against him or form a basis for any presumption or inference unfavorable to him. You must not permit such fact to weigh in the slightest degree against such a defendant, nor should it enter into your discussions or deliberations.

In order to return a verdict on any count as to any defendant, each juror must agree on the particular finding as to the particular defendant, that is, the finding must be unanimous. The form of your report will be that you find the defendant guilty or not guilty of the particular charge that you are considering.

I have given you a suitable form which names each defendant who is now before you and identifies the counts in the indictment against that defendant that you are to consider with appropriate columns for recording your vote.

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Each defendant is entitled to have determined whether he is guilty or not guilty as to each of the crimes charged, determined from his own conduct and from the evidence which applies to him as if he were being tried alone.

Whether any one defendant is guilty or not guilty of the crimes charged should not influence your verdict respecting any other defendant. The jury may find any one or more of the defendants guilty or not guilty on one or more counts.

You will have an opportunity to call for and read the indictment yourselves, but I will give it to you at this time so that you can follow the course of this charge.

Two classes of charges are before you, as I have said, distribution or possession with intent to distribute controlled drug substances, and such counts are known as substantive counts, and separately a conspiracy or scheme to distribute or to possess with intent to distribute controlled drug substances.

I will read the indictment to you in the sequence of the substantive charges and then the conspiracy charge.

Count 3. The grand jury further charges on or about the 13th day of December, 1973, in the Southern District of New York, William Brandt, the second, David

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Flores and Dean Peter Vavarigos, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a schedule 3 controlled substance, to wit, approximately 27.11 grams of PCP.

I think you will recall that that was a horse drug.

Count 4. The grand jury further charges on or about the 3rd day of January, 1974, in the Southern District of New York, William Brandt the second, David Ross Miley and John Godinsky, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a schedule 1 controlled substance, to wit, approximately 665087.5 micrograms of lysergic acid diethylamide, LSD, in the form of 3,850 dosage units.

Count 6. On or about the 12th day of February, 1974, in the Southern District of New York, William Brandt, the second, David Ross Miley and Robin Bachia, the defendants, unlawfully, intentionally and knowingly did distribute and possessed with intent to distribute a schedule 1 controlled substance, to wit, approximately 1,800 dosage units of LSD.

Count 8. On or about the 12th day of February, 1974, in the Southern District of New York, Marvin Thomas Goldstein, the defendant, unlawfully, intentionally and

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1 knowingly did possess with intent to distribute a schedule
2 1 controlled substance, to wit, approximately 4,000 dosage
3 units of LSD.
4

5 Count 9. The grand jury further charges on or
6 about the 12th day of February, 1974, in the Southern
7 District of New York, Joseph Raymond Wenzler, the defendant,
8 unlawfully, intentionally and knowingly did possess
9 with intent to distribute a schedule 1 controlled substance,
10 to wit, approximately 295 tablets containing LSD.

11 I will now turn to count 1, the conspiracy count.

12 From on or about the 1st day of November, 1973,
13 and continuously thereafter up to and including the date
14 of the filing of this indictment, in the Southern District
15 of New York, William Brandt, the second, David Ross Miley,
16 Joseph Raymond Wenzler, Marvin Thomas Goldstein, Dean
17 Peter Vavarigos, Robin Bachia, John Godinsky, Jan Lang
18 and David Flores, the defendants, and others to the grand
19 jury unknown, unlawfully, intentionally and knowingly
20 combined, conspired, confederated and agreed together
21 and with each other to violate Sections 812, 841(a)(1) and
22 841(b)(1) of Title 21, United States Code.

23 It was part of said conspiracy that the said
24 defendants unlawfully, intentionally and knowingly would
25 distribute and possess with intent to distribute schedule 1

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and 2 controlled substances, the exact amount thereof being to the grand jury unknown, in violation of Sections 812, 841(a)(1) and 841(b)(1)(B) of Title 21, United States Code.

Overt acts.

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York.

On or about November 27, 1973, defendants William Brandt, the second, and John Godinsky sold a quantity of LSD for \$650.

On or about December 13, 1973, defendant William Brandt, second, went from the Village Plaza Hotel, 79 Washington Street, New York, to the vicinity of Avenue A and East 11th Street.

On or about December 13, 1973, defendants William Brandt, second, David Flores and Dean Peter Vavarigos had a meeting in apartment 4A, 501 East 11th Street, New York, New York.

On or about December 13, 1973, defendants William Brandt, second, David Flores and Dean Peter Vavarigos sold a quantity of PCP for \$1,800.

On or about January 3, 1974, defendant John Godinsky went from the area of the Village Plaza Hotel,

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79 Washington Street, New York, New York, and proceeded to the area of West 4th Street and Bowery Street.

On or about January 3, 1974, defendants William Brandt, II, David Ross Miley and John Godinsky sold a quantity of LSD for \$1,825.

On or about January 10, 1974, the defendant Dean Peter Vavarigos gave away a quantity of PCP as a sample.

On or about January 15, 1974, the defendants William Brandt, II, Jan Lang and Joseph Raymond Wenzler sold a quantity of LSD for \$1,200.

On or about February 12, 1974, the defendants William Brandt, II, David Ross Miley and Robin Bachia sold approximately 1,800 dosage units of LSD for \$660.

On or about February 12, 1974, Robin Bachia transported to the area of Third Avenue and St. Marks Place approximately 10,000 dosage units of LSD.

The essence of the crime of conspiracy is the scheme or plot understanding or agreement to violate other laws. It makes no difference whether the scheme was successful or whether it failed of its purpose, it is still punishable as a crime. Consequently, on a controlled substances conspiracy charge there is no need to prove an actual violation of the federal drug laws, it is enough

1 gth

2 that there was a criminal plan.

3 The conspiracy statute, Section 371 of Title
4 18 of the United States Code, provides in pertinent part
5 as follows:

6 "If two or more persons conspire to commit any
7 offense against the United States and one or more of such
8 persons does any act to effect the object of the conspiracy,
9 each shall be guilty of a crime."

10 The comprehensive Drug Abuse Prevention Act of
11 1970 sets forth the law pertaining to controlled substances.
12 This law was passed by Congress because of a concern with
13 the illegal distribution of and possession with intent
14 to distribute the drugs named therein which have a sub-
15 stantial and detrimental effect on the health and welfare
16 of our people. The part of this Act which is applicable
17 to the charges here is called the Controlled Substances
18 Act, which became effective on May 1, 1971.

19 The term "controlled substances" is used in the
20 Act to refer to any drug included in one of the five
21 schedules contained in the Controlled Substances Act.
22 LSD is included in schedule 1. THC -- and I haven't given
23 you the chemical name of that previously, which is tetra-
24 hydracannabinol -- THC is included in schedule 2. PCP
25 is included in schedule 3.

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Among other things, the Act makes it unlawful for any person to knowingly or intentionally distribute or possess with intent to distribute any controlled substances such as LSD or THC or PCP. In addition, any person who conspires to commit such an offense commits a crime.

I remind you that the conspiracy count as distinguished from the substantive counts does not apply to PCP, which, although it too is a controlled substance, is a schedule 3 drug, and the grand jury's charge here of the scheme or conspiracy recited only a relation to schedule 1 and schedule 2 drugs. The only drugs that have been mentioned in the evidence that are in schedule 1 or schedule 2 are LSD, THC and cocaine.

In order to prove the crime alleged in the first count, that is, the criminal conspiracy, the government must establish several elements beyond a reasonable doubt.

First, the proof must show that the conspiracy during part or all of the period from on or about November 1, 1973, until the indictment in this case was filed on February 21, 1974. The government is not required to prove that the conspiracy began on a specific day or ended on a specific day. Proof that a conspiracy existed for a substantial portion of that period, even though it might be a relatively small part of that period, would be

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2 be sufficient.

3 Second, the government has to prove that it
4 was part of the conspiracy to unlawfully violate the
5 controlled substances statute to which I have referred.

6 Third, the government must prove that the defendant
7 being considered knowingly and wilfully became a participant
8 in the conspiracy.

9 Fourth, the government must prove that least
10 one alleged co-conspirator knowingly committed at least
11 one of the alleged overt acts in furtherance of the con-
12 spiracy during the period of its existence.

13 I have read to you the overt acts recited in
14 the indictment. Under our law it is not sufficient
15 to constitute a crime to agree mentally to an unlawful
16 scheme if no act occurs to carry out some part in
17 the conspiracy. Such an act is called an overt act because
18 it is an actual and open and not a concealed act. The
19 overt acts have been cited to you.

20 If the government has failed to establish
21 beyond a reasonable doubt each of the essential elements
22 mentioned as to any defendant, you must acquit that
23 defendant on the conspiracy charge. If, on the other
24 hand, it has established each of the elements as to the
25 defendant you are considering, you are to find that defendant

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you are considering, you are to find that defendant guilty.

Now, what is a conspiracy? It is simply a combination or an agreement or a scheme of two or more persons or concerted acts by two or more persons to accomplish a criminal or unlawful purpose. There have to be at least two people involved. You can't conspire with yourself. It is, in essence, a partnership in crime. The gist of the offense is the combination or agreement to violate the law.

In this case the offense charged was violation of the federal drug laws, as I mentioned, in furtherance of which an overt act was committed according to the indictment.

It is not necessary that a conspiracy be established by direct evidence in order to convict. It being rarely proved in that fashion. You may consider, if you wish, whether people sit down and sign agreements to engage in an unlawful scheme or activity or have them notarized or made known to the public. You may consider, if you wish, whether that type of conduct would be extraordinary.

Your common sense will tell you that when men, in fact, enter into a criminal conspiracy, much is left to the unexpressed understanding. It is sufficient if two

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or more persons in any manner, impliedly or tacitly, come to a common understanding to violate the law. It is not necessary that the persons charged sit down and enter into a formal agreement or state all the details of their agreement or scheme how it is to be effectuated.

A conspiracy may, on occasion, involve a matter of inference to be drawn from the conduct of the persons charged. Actions may often speak louder than words and a defendant's participation in a conspiracy may be inferred from such facts and circumstances in evidence as appear to you logically to support or sustain such an inference. It is sufficient if it be shown beyond a reasonable doubt that the defendant and ^{an} alleged co-conspirator came to a mutual understanding to accomplish an unlawful act.

To determine whether a conspiracy existed you piece together the independent evidence relating to each alleged conspirator and determine looking at the whole picture whether the acts, conduct and statements of the alleged conspirators and the reasonable inferences to be drawn from their acts, conduct and statements establish to your satisfaction beyond a reasonable doubt that there was a single conspiracy.

If, for example, there was a concerted action among several persons with each of them doing something

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2 related to the act of the other all of which contributed
3 in the same or similar manner toward the accomplishment
4 of some unlawful objective, such evidence would support
5 the inference that those persons had conspired together to
6 accomplish that unlawful purpose.

7 I call to your attention that an unlawful scheme
8 or agreement may exist even though the individual alleged
9 conspirators may have done some acts in furtherance of
10 a common unlawful purpose apart from and even unknown
11 to the others.

12 Although I have instructed you that it is not
13 necessary to prove that the parties ever came together
14 and entered into an informal or a formal agreement or
15 arrangement between themselves, I do not mean to imply
16 or infer that a conspiracy as alleged in the indictment
17 in fact existed. As I previously told you, that is not
18 my function. That is the determination of fact which you
19 must make.

20 A conspiracy, once formed, is presumed to continue
21 until either its objective was accomplished or until there
22 is some affirmative act of termination by its members.
23 A conspiracy is not ended as long as the evidence shows
24 an intention to continue it. Such intention may be inferred
25 from activities of conspirators in furtherance of the

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unlawful purpose of the alleged conspiracy.

Once a person is found to be a member of the conspiracy, he is presumed to continue his membership therein until its objective was accomplished or there was some affirmative act of termination by its members or until his withdrawal.

As I have said, an unlawful conspiracy may exist even though its purposes are not accomplished, but evidence that its purposes were accomplished, such as proof of actual sales or distribution, may be considered by you if you find that there is such evidence as proof bearing on the existence of the conspiracy.

If you find that the alleged conspiracy as charged in the indictment did exist, you must focus your attention next and separately on each defendant to determine whether the defendant knowingly and wilfully became a member of the conspiracy. Of course, if you find that no conspiracy existed, that would end the consideration of count 1 and it would be unnecessary for you to consider any other factors.

To determine whether a defendant was a member of the alleged conspiracy, you ask yourselves whether that particular defendant acted wilfully and with knowledge that his acts were an integral part of the unlawful

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enterprise and to help carry it forward as an associate or worker in it. You must find that the defendant knew what the unlawful purpose was and a stake or a personal interest in it as distinguished from acting exclusively on his own.

It is not necessary that a defendant be fully informed as to the details or the full scope of the alleged conspiracy in order to justify an inference of knowledge on his part nor need he even know all the alleged co-conspirators.

The guilt of an alleged conspirator is not measured by the extent or duration of his alleged participation. Even if he participated to a degree more limited than that of his co-conspirators or in a subordinate or a minor way relatively, he is equally culpable, so long as he was, in fact, a conspirator.

The scope of each defendant's agreement must be determined individually from what was proved as to that defendant. In order for a defendant to be held for joining others in an alleged conspiracy he must in some sense promote the venture himself and make it his own. To do this you must determine what each conspirator is promoting and making his own.

A single act may be the basis for drawing an

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2 actor within the ambit of an alleged conspiracy, but since
3 conviction of conspiracy requires an intent to participate
4 in the unlawful enterprise, the single act must be such
5 that one may reasonably infer from it such an intent.

6 Stated another way, a sale or purchase scarcely
7 constitutes a sufficient basis for inferring an agreement
8 with the opposite parties for whatever period they continue
9 to deal in this kind of contraband, unless some such
10 understanding is evidenced by other conduct which ac-
11 companies or supplements the transaction.

12 Proof of participation in a single isolated
13 controlled substances transaction standing alone is in-
14 sufficient to warrant conviction of conspiracy when there
15 is no independent evidence tending to prove that the
16 defendant had some knowledge of the broader conspiracy
17 and an intention to participate therein, that is, when the
18 single transaction is not in itself one from which such
19 knowledge and intent may be inferred.

20 I want to call to your attention that merely
21 association with one or more of the alleged conspirators
22 does not make one a member of the alleged conspiracy,
23 nor is knowledge without participation sufficient. A mere
24 willing participation and acts with alleged co-conspirators
25 knowing in a general way that their intent was to break

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the law is, if standing alone, insufficient to establish an individual's own participation in a conspiracy. There must be participation in the alleged conspiracy with an intent to further the common purpose or design. In short, a person becomes a member of an alleged conspiracy by associating himself even though informally with a common plan or scheme by participating, knowing the central aim or purpose and intending to aid in bringing about the success of the plan or scheme.

All conspirators or alleged conspirators need not have originally or simultaneously conceived the alleged conspiracy or participated in it at its inception. In order to be guilty one who comes in later with the knowledge of the means and purpose, although not necessarily of the details, and who intentionally cooperates in a common effort to gain the unlawful result may become a member of the alleged conspiracy equally with the alleged conspirators and he is legally responsible for the purposes of the conspiracy count for all of the acts done by any of the other members before or afterwards in furtherance of the common objective just like any partner who is a member of a partnership agreement.

The acts or statements of one alleged co-conspirator may be considered by you as evidence against

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other alleged co-conspirators, but only if you find that the statements and acts were spoken and done during the continuance of the alleged conspiracy and in aid of and in furtherance of the purpose of the alleged conspiracy. You must be satisfied beyond a reasonable doubt that a conspiracy existed and that the defendant joined the conspiracy before you can regard the act of any defendant as being in furtherance of a conspiracy alleged in this indictment.

The status of the managing partner, supervisor or worker, his participation in key conversations or transactions, his participation in the alleged plan, scheme or agreement must be considered. You must find beyond a reasonable doubt that he did, in fact, join the alleged conspiracy with knowledge of its unlawful purpose and intended to aid and assist in accomplishing that purpose. This intent may be inferred from his acts and declarations and no direct proof is necessary.

In sum, the participation of a defendant must be established by his own actions, by his own statements and declarations, by his own knowledge or lack of knowledge, by his own connection with the acts and statements of other alleged co-conspirators.

The defendants deny the existence of any

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conspiracy and each denies any membership in a conspiracy. Further, they say if the jury were to find proof of conspiracy, it was a multiple conspiracy.

It is contended here that the government has failed to prove the existence of only one alleged conspiracy but has proved several separate and independent alleged conspiracies, that is, multiple conspiracies, involving various of the defendants.

Proof of several separate and independent conspiracies is not proof of a single overall conspiracy, which is charged in this indictment. And if you find that the government has failed to prove the existence of only one conspiracy, you must find the defendants not guilty on the conspiracy count.

I wish to make it clear that the defendants deny any conspiracy, single or multiple, existed.

In determining whether there was a single overall conspiracy, you may consider what the evidence shows as to the time, parties or objects and changes of personnel and activity. You may find a single conspiracy even though there were changes in personnel and activities, providing you find that some of the co-conspirators continued throughout the life of the alleged conspiracy and that the purposes of the alleged conspiracy continued

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to be those charged in the indictment. The issue turns on whether the proof warrants an inference that the defendant was aware of and, thus, knowingly furthered an overall going venture or partnership.

You are instructed that in order to prove one single conspiracy the government has to prove beyond a reasonable doubt that each of the persons whom you find to be members of the conspiracy intended to make himself part of the scheme charged in the indictment.

The mere fact that the parties are not always identical does not mean that there are separate conspiracies. In other words, if at all times the alleged conspiracy had the same overall primary purpose and the same nucleus of participants, the alleged conspiracy would be the same basic scheme even though in the course of its operation additional alleged conspirators joined in and performed functions to carry out the scheme while others were not active or had terminated their relationship.

On the other hand, if you find that one overall conspiracy terminated and another one was formed, you may not find a single conspiracy even though the purposes of both conspiracies were the same and that some of the defendants were members of both. In essence, therefore, the question is, what is the nature of the scheme or agreement?

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That is for you to determine after examining all the evidence.

Thus, to summarize my third question whether a defendant was a member of the alleged conspiracy, where you find that a violation of the statute was sought to be accomplished and two or more persons actuated by a common purpose of accomplishing that end knowingly worked together in any way in furtherance of the unlawful scheme, every one of such persons becomes a member of the alleged conspiracy even though his part in it may be separated in time from the activities of his co-conspirators.

If you find that the alleged conspirators existed and that the particular defendant as to whom the charges are being considered by you was a member, you reach the fourth and final step, and that is that you must determine whether one or more members of the alleged conspiracy, not necessarily the particular defendant you are considering, has committed one or more of the overt acts alleged in the indictment to have been committed in furtherance of some object or purpose of the alleged conspiracy and that it was committed in furtherance of that act, object or purpose.

The object of a conspiracy is complete when the unlawful agreement is made and any single related

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1 gth

2 overt act in furtherance of it is done by one of the
3 alleged co-conspirators. Thereafter, an act done by
4 any one of the alleged conspirators in furtherance of the
5 alleged conspiracy becomes an act by all members of the
6 illegal partnership.

7 Of course, an overt act by anyone who is not
8 a member of the alleged conspiracy would not apply.

9 What is an overt act?

10 An overt act is an open act or step or action
11 or conduct taken to achieve, accomplish or further the
12 objectives of the alleged conspiracy. The purpose of re-
13 quiring proof of an overt or open act is to assure that
14 where parties have conspired and agreed to do some unlawful
15 thing but they have changed their minds and abandoned
16 the project or done nothing at all to carry it out they
17 will not be charged with a crime.

18 The prosecution is not required to set forth
19 in the indictment each and every act on which it relies
20 to establish the alleged conspiracy or on which it relies
21 to establish each defendant's participation in such con-
22 spiracy, nor is the prosecution required to prove each overt
23 act which may have occurred during and in furtherance
24 of such conspiracy. It is required only to prove that
25 at least one such act did take place.

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The overt act proved need not be a criminal act in and of itself, nor need it be the crime which is the object of the alleged conspirators. It may consist of the holding of a meeting or the like, providing the act was to further the objective of the alleged conspiracy.

That completes the discussion of the conspiracy count. Since you have listened to me for quite a long time, we will take a short pause where you can relax in place before I complete the balance of the charge.

(Pause)

All right, ladies and gentlemen, I will continue.

I will now turn to the essential elements of the substantive counts which are numbered 3, 4, six, 8 and 9.

Before you can find the named defendants guilty of the crimes charged in those counts in this indictment, you must be convinced and find beyond a reasonable doubt as to the count and the defendant you are considering that the government has proved the following essential elements.

First, that on or about the date set forth in each count, the defendant or defendants named in that count distributed or actually or constructively possessed with intent to distribute the controlled substance drug

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2 named in that count. It is sufficient if you find either
3 distribution or possession with intent to distribute.

4 Second, that he did so unlawfully, wilfully
5 and knowingly.

6 Third, that the substance alleged in the
7 respective count was, in fact, a controlled substance drug.

8 The word distribute means the actual or con-
9 structive or attempted transfer of a drug.

10 The word possess has its common everyday meaning,
11 that is, to have something within your control. And to have
12 something within your control does not necessarily mean
13 to have it in your hands or pocket. Control may be demon-
14 strated by the existence of a working relationship between
15 the person having such control and the person with actual
16 physical custody.

17 The word intent refers to a person's state of
18 mind so the term possessed with intent to distribute
19 can be fairly stated to mean to control an item with
20 a state of mind or purpose to transfer that item or to
21 cause it to be transferred.

22 The proof of actual possession is not necessary
23 to sustain a conviction for violation of the statutes
24 involved, constructive possession is sufficient. Such
25 possession need not be exclusive but may be shared with

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others. Moreover, it may be proved by circumstantial as well as by direct evidence.

Mere presence in the area where a controlled substance drug is discovered or the mere association with a person who controls the drug or the property where it is located is insufficient to support a finding of possession. If you find beyond a reasonable doubt that the transfer alleged to have been made was made, I charge you that each such transfer satisfies this requirement of the statute.

As to the second element, the terms unlawfully, wilfully and knowingly, they mean that you must be satisfied beyond a reasonable doubt that the defendant knew what he was doing and that he did it deliberately and voluntarily as opposed to mistakenly or as a result of some coercion. Of course, it is not necessary that the defendant knew that he was violating any particular law, rather, it is sufficient if you are convinced beyond a reasonable doubt that he was aware of the general unlawful nature of his acts.

Knowledge and intent exist in the mind. Since it is not possible to look into a man's mind to see what went on in it, the only way you have of arriving at a decision on these questions is for you to take into consideration all the facts and circumstances shown by the evidence, including the exhibits, and to determine from all such

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facts and circumstances whether the requisite knowledge and intent were present at the time in question. Direct proof is unnecessary.

Knowledge and intent may be inferred from all the surrounding circumstances. As far as intent is concerned, you are instructed that a person is presumed to have intended the natural and probable or ordinary consequences of his acts.

As to the third element, the indictment charges that the controlled substance in these substantive counts is either LSD or PCP. I instruct you, again, as a matter of law that each of those is a controlled substance. You, however, must still find beyond a reasonable doubt that the substances charged in the substantive counts to have been distributed were LSD or PCP.

There is a stipulation before you to the effect that if the chemist were called to the witness stand he would testify that the substances referred to in the evidence on the substantive counts were, in fact, LSD or PCP.

I have now reviewed the elements of the substantive counts that the government must prove beyond a reasonable doubt before you can find that the defendant is guilty on those counts. There is, furthermore, another method by

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which you should evaluate the evidence and which would sustain a finding of guilt of the defendant charged on the substantive counts even though the government's proof on the substantive counts was not sufficient as to him to establish all the required elements.

You will recall that in the instructions I have given you as to the crime of conspiracy charged in the first count that if you find pursuant to those instructions that a particular defendant was a conspirator, was a member of the single conspiracy and, hence, guilty under the first count, you may find him guilty as well under a substantive count in the indictment, providing you find the crime charged in the substantive count was committed and that it was committed during and in furtherance of the conspiracy charged in the first count.

If he is a member of a conspiracy, just like a partner, he is criminally responsible for the substantive crimes and may be found guilty of those. The reason for this is that his co-conspirator committing the substantive crimes is the agent of the other members of the alleged conspiracy.

However, if a particular defendant was not a member of the alleged conspiracy or if the crime charged in the substantive count was not committed during the

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pendency of the alleged conspiracy or if the crime charged in the substantive count was not done in furtherance of the conspiracy, then you may not find the defendant guilty of the substantive count, unless as to him the government has proved beyond a reasonable doubt, along with all the other elements I have given you, that the defendant did the acts charged in that particular substantive count or aided and abetted in the commission of the substantive crime.

In this connection, Section 2 of Title 18 of the United States Code, provides that a person who aids, abets, counsels, commands, induces or procures the commission of an offense against the United States is as equally punishable as the person who commits the offense directly.

In order to aid and abet another to commit a crime, it is necessary that a defendant in some sort associate himself with a venture that he participate in it as in something that he wishes to bring about and that he seek by his actions to make it successful.

Mere knowledge that a crime is being committed, even when coupled with presence at the scene, is not enough to constitute aiding and abetting, rather, it is required that an individual promote the venture himself,

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make it his own, have a stake in the outcome.

Much of the evidence adduced by the government was adduced in support of the conspiracy count of the indictment. Much of the same evidence has been produced in support of the substantive counts of the indictment. If the evidence relates to and is connected up with the conspiracy count and the substantive counts, there is nothing inconsistent with using parts of the same evidence to prove that a particular defendant committed a substantive crime and also to prove that he was a member of a conspiracy.

You may also be asking yourselves whether the same test as to the use of the evidence applies to the substantive counts as to the conspiracy counts. Particularly, you may be wondering whether if you find that all of the elements of the alleged conspiracy were present as to two or more defendants, acts or declarations of one alleged conspirator in furtherance of the alleged conspiracy may be considered in determining the guilt or innocence of the member defendants on the substantive counts. The short answer to this question is yes.

Evidence of acts or declarations of one conspirator binding on a confederate on an agency theory are not to be confined to the conspiracy count. Such evidence is also competent to prove guilt of the substantive crime

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if you find that there was a conspiracy in existence and that the defendant was a member of it.

As I indicated previously, to convict on a substantive count you must find beyond a reasonable doubt that the defendant acted unlawfully, wilfully and knowingly as I have already defined those terms for you.

The government contends that the evidence shows that on several occasions when Agents Palombo and Nieves discussed narcotics with Dean Vavarigos, Robin Bachia, William Brandt and David Miley that those conversations were taped with various recording devices.

Just in case you might have some doubts on this subject, I am instructing you that the use of these devices in the manner described in this case is entirely within the law and violates no one's rights. This is so essentially because Agents Palombo and Nieves, who were participants in the conversations, consented to have them recorded. Accordingly, the use of these devices was a proper investigative technique.

The government further contends that its evidence shows that on February 12, 1974, the defendants Joseph Wenzler and Marvin Goldstein were arrested in their apartments, that Marvin Goldstein executed a written consent to search form and that Joseph Wenzler gave oral

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2 consent to search.

3 The searches conducted in the apartments of
4 Joseph Wenzler and Marvin Goldstein were, according to the
5 government, conducted in their presence and the government
6 contends were with their consent. If you determine that
7 consent was given as testified, then the same were lawful
8 and the evidence before you has been lawfully introduced.

9 Members of the jury, under your oath as jurors
10 you cannot allow any consideration of the punishment which
11 might be inflicted upon a defendant if convicted to influence
12 your verdict in any way or in any sense enter into your
13 deliberations. The duty of imposing sentence following
14 conviction rests exclusively upon this court. That is
15 solely the judge's responsibility. Your function is to weigh
16 the evidence in the case and to determine whether the
17 defendants are guilty or not guilty solely on the basis
18 of such evidence and the law.

19 You are not here to improvise the rules of law
20 or remake them by indirection or subtlety. You are bound
21 to administer the law as it stands. There should be no debate
22 in a jury room or in a juror's mind as to the wisdom of
23 the law. It would be a violation of your sworn duty to dis-
24 regard the law or fail to apply it to the facts in evidence.
25 This is neither a popularity contest or a sympathy chamber.

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It is a hall in which each of us, sworn to uphold the law, must do our duty regardless of how personally distasteful that might be.

You are to decide the case upon the evidence alone. You must not be influenced by any assumptions, conjectures or inferences not warranted by the facts, unless and until proven to your satisfaction.

In deliberating on this case I want you to listen to each other carefully in the jury room. If you think you are wrong and somebody else is right, do not be embarrassed about changing your mind. But remember each of you is to decide the case for yourself. You must bring in a verdict for or against the defendant in question on each count under which the defendant is charged whether not guilty or guilty and any verdict, as I have said before, to be acceptable must be unanimous as to a count on which you are reporting.

Use your common sense in evaluating the evidence and circumstances and probabilities. Suspicion, conjecture should not be substituted for the evidence. Do not allow yourselves to be swayed or carried away or inflamed by appeals to passion, sympathy or prejudice. Maintain a clear view of the case and do not be sidetracked by anything or anybody from a fair dispassionate consideration

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2 of the evidence in arriving at your resolution of the facts
3 in the case that you are now deciding.

4 The oath that you took at the outset when you
5 were sworn as jurors really sums up what you are supposed
6 to do in this case, and that is without fear or favor
7 to any party, you will well and truly decide the issues
8 according to the evidence and the law as stated to you by
9 the court.

10 If you desire any of the exhibits, those will be
11 sent to you in the jury room upon request. As I have said,
12 you may hve a copy of the indictment if you desire to
13 have it.

14 If you want any of the testimony read, that can
15 be done, also. It is not easy to find the testimony in
16 the notes of the reporter, so, therefore, try to be as
17 specific as you can in regard to any requests that you do
18 make.

19 Please do not communicate with anyone concerning
20 your deliberations about this case except in writing signed
21 by your foreman, unless you choose another person than
22 the gentleman who sits in the first seat. He will be
23 provided with adequate pencils and papers by the marshals.

24 Now I would like to take a few minutes to
25 talk to the lawyers. They may wish to call to my attention

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any matter on which I misspoke or which I may have overlooked, so if you will just relax in the jury box I will talk to them.

I want to call to your attention that there is a stenographic error in the form of the verdict that I furnished to you, and that is the last of the counts on the page is actually count IX, nine, not ten, so that the foreman will correct his copy accordingly since that will be the one which ultimately will be the one to be signed and returned. The other forms of verdict are merely for your convenient use and they will be handed in to the clerk when you have completed your deliberations.

Gentlemen, come up.

(At the side bar.)

THE COURT: Mr. Batchelder, for the government, are there any exceptions?

MR. BATCHELDER: Yes, there are, your Honor.

With respect to your charge that the single act of a mere narcotics transaction cannot be considered or constitute knowledge of a conspiracy, I cite to the court the case of U.S. v. Ramirez in which Mr. Gillers' single act conspiracy theory as to the single act has been rejected, 482 Fed. 2nd, 2nd Circuit, 807, 1973.

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On almost the identical same facts in which two conspirators were together, the drugs were delivered by a third conspirator, the traditional approach was taken that the delivery and the mere presence on this single act made it such that it could not form the basis of the conspiracy, I quote from the court's opinion:

"While Gutaris' participation may be limited to a single act as she contends, that being the delivery of the narcotics on that one occasion, that the sale, if you will, that act was the consummation of the crimes charged, in this instance the delivery of the THC, and the jury could have reasonably inferred that Gutaris knowingly and intentionally participated in the conspiracy," and that applies here as it did in the Ramirez case because there were two other co-conspirators present.

Therefore, the court's charge on the issue of the single act, according to the government's position, is error, especially in light of the close factual record where she only made one single act, that being the delivery of the narcotics.

In this case there was a single sale. Flores must have known that since it was done in his apartment, Vavarigos was present, he received money. It cannot be held to be a single act under any way, shape, form or manner

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2 and he had to have knowledge of it because Brandt sent
3 the agents over there along with him.

4 That is the only objection the government has,
5 your Honor.

6 If you wish to read the decision, I have it
7 here.

8 THE COURT: You apparently misheard the charge.
9 I didn't give the charge as you have indicated that I
10 should not have given. The charge as given is entirely,
11 in my judgment, consistent with the language you have
12 read.

13 MR. BATCHELDER: The government has its objection.

14 THE COURT: Are there any exceptions or requests
15 on the part of the defendant Miley?

16 MR. FRACTENBERG: If your Honor please, all I
17 wish to say is that since your Honor indicated that the
18 jury may have a copy of the indictment, that with respect
19 to overt act dealing with November 27, 1973 --

20 THE COURT: That has already been taken care of
21 by a copy that I showed to other counsel.

22 MR. FRACTENBERG: Okay. I didn't see it, Judge.
23 Thank you.

24 THE COURT: You have no exceptions or requests,
25 Mr. Meyers?

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2 MR. MEYERS: Yes, I do.

3 Your Honor, I think the same mistake must have
4 been made on this occasion as I think you ultimately
5 corrected on the first trial in dealing with -- I think you
6 made some statement to the effect that the government
7 contended there was a single conspiracy and the defendants
8 contended there were multiple conspiracies.

9 The defendants contend there were no conspiracies
10 at all.

11 THE COURT: You misheard the charge. I expressly
12 charged to the contrary at the suggestion of Mr. Gillers.

13 MR. FRACTENBERG: That's right.

14 MR. MEYERS: In relation to count number 10--

15 THE COURT: Is that your recollection, Mr. Gillers?

16 MR. FRACTENBERG: Yes.

17 MR. GILLERS: Your Honor, I have no problem
18 with this charge at all. I think it is eminently fair.

19 MR. MEYERS: In relation to count number 9
20 you referred solely to leave the question to the jury,
21 solely on the question of consent to search, but you did
22 not touch the question as to whether there was consent
23 to enter the apartment.

24 THE COURT: I received no request on that subject
25 from either the government or the defendants and I think

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2 that that is a detail of evidence that I need not go into.

3 MR. MEYERS: I think the evidence will show that
4 that was a question --

5 THE COURT: I decline to make any additions
6 to the charge on that score, as there was no such contention.

7 MR. MEYERS: Exception, your Honor.

8 I specifically request your Honor to charge
9 as follows:

10 That one of the government witnesses, Starbuck,
11 participated in the crimes charged in the indictment and,
12 therefore, was an accomplice. Starbuck's testimony must,
13 therefore, be received with caution and weighed with
14 care, citing Silkworth v. The United States, 10 Federal
15 2nd, 711 in this circuit, and the United States v. Marx,
16 368 Federal 2nd, 5566 in the Second Circuit.

17 MR. BATCHELDER: May the government be heard on
18 that, your Honor?

19 In both Marx and Silkworth, the person was
20 an accomplice.

21 MR. MEYERS: May I offer the request.

22 MR. BATCHELDER: In this instance, Starbuck
23 was an informer and, therefore, in Silkworth and Marx
24 it may be quite proper to charge that he was part of it,
25 but in this instance there is no evidence whatsoever that

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Starbuck, acting in the traditional role of an informant, such as in Soles and Cirillo, Sperling, in any way was an accomplice to these defendants and, therefore, Mr. Meyers' charge is totally out of line.

THE COURT: I think that that's correct, but I will make a statement without ruling that Starbuck was an accomplice. I don't think the evidence warrants the statement that he was an accomplice at all.

MR. MEYERS: Your Honor, certainly all the evidence indicates that he participated in the transactions.

THE COURT: That does not make him an accomplice.

MR. MEYERS: Then he is a principal.

THE COURT: All right, Mr. Meyers.

Are there any exceptions or requests by Mr. Cohen?

MR. COHEN: No, none, your Honor.

THE COURT: Are there any exceptions or requests by Mr. Jacobson?

MR. JACOBSON: No, your Honor.

THE COURT: Are there any exceptions or requests by Mr. Gillers?

MR. GILLERS: None, your Honor.

THE COURT: All right, gentlemen.

(In open court.)

THE COURT: One small addition and that is this:

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2 I instructed the jury on the consideration
3 of the credibility of witnesses and I would like to add that
4 should the jury find from the evidence that anyone who
5 testified was an accomplice, the jury will consider the
6 testimony of such a person with care and examine it with
7 utmost scrutiny.

8 That completes the charge.

9 We are now at the point, where having reached the end
10 the trial successfully with all present and accounted for
11 that we may now excuse the alternate jurors from further
12 participation in the case.

13 So Mr. Fitzgerald, Miss Gordon, Mr. Brendon
14 and Mr. Fowler are excused with the thanks of the court.

15 Will you please hand back to the clerk the forms
16 that you have and you may depart.

17 Thank you very much.

18 (Alternate jurors excused.)

19 THE COURT: As to the jury itself, let me give you
20 the option.. After we swear the marshals, you may wish to
21 commence your deliberations immediately and go out to lunch
22 at one or you may wish to go out to lunch now and commence
23 your deliberations on your return.

24 Do you have a preference?

25 (Two marshals were duly sworn.)

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THE COURT: Mr. Brown, what is the view of the jury?

THE FOREMAN: We would like to go to lunch now.

THE COURT: The marshals will take you all to lunch.

(At 12:10 P.M. the jury went to lunch, after which they returned to the jury room to deliberate upon a verdict.)

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2 motions presently in other matters, is to ask the reporter
3 to see whether he can locate the relevant portions of the
4 record and as soon as we do we will have the jury in to
5 see whether we can satisfy their requests.

6 MR. BATCHELDER: Your Honor, the latter part
7 is Mr. Starbuck's testimony.

8 (At 3:50 P.M., in open court; jury present.)

9 THE COURT: Ladies and gentlemen of the jury,
10 as I suggested to you several hours ago, we do not have
11 a stenographic transcript of the testimony so your various
12 notes, and we have gotten three from you now, requesting
13 portions of the record required us to go to those paper
14 tapes on which the stenotype is done to try and find within
15 the confines of those places because there are no indices
16 with which to work answers to specific questions and we
17 are unhappy to say that we haven't found all of the places
18 yet calling for all of the things that you have requested.

19 The one thing that I think we can give you is
20 what I said about conspiracy, because that happens to be
21 in one place, but when you ask for testimony, all the
22 testimony about a particular person on a particular day,
23 it might have come in in the last four days at different
24 points and it takes an enormous amount of time and that
25 is the reason why we say to you not that we wouldn't give

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2 it to you but it takes an enormous amount of your time
3 and our time before we can read it to you.

4 So we will try to take these things up to the
5 degree that we have already been able to establish it.

6 We will take up the first question, the Judge's
7 charge on the definition of conspiracy.

8 I take it that what you are talking about
9 is that part of the charge where I asked the rhetorical
10 question, what is a conspiracy, and then I gave you my
11 answer.

12 I will read from the charge that I have here,
13 which I think is an exact copy of what the reporter has,
14 on this subject fortunately, because my notes are not
15 completely exact because there were parts of my charge
16 that I delivered to you extemporaneously.

17 I said to you, what is a conspiracy? It is
18 simply a combination or agreement or a scheme of two or
19 more persons or concerted acts by two or more persons to
20 accomplish a criminal or unlawful purpose. There have to
21 be at least two people involved. You can't conspire with
22 yourself. It is, in essence, a partnership in crime. The
23 gist of the offense is the combination or agreement to
24 violate the law. In this case the offense that was charged
25 was violation of the federal drug laws, as I mentioned, in

1 gth

2 furtherance of which an overt act was committed ac-
3 cording to the indictment.

4 That is the definition that I gave you of
5 conspiracy.

6 Mr. Foreman, is that an answer to your question?

7 THE FOREMAN: It is clear to me, sir, yes.

8 THE COURT: All right.

9 You also asked for the testimony, and this just
10 says David Flores on or about December 13th involvement.

11 We will give you what the reporter has found
12 up to the present. If contained in what he has found that
13 satisfies your inquiry, we won't look for the rest. If it
14 does not, we will have to give you this now and look for the
15 rest while you deliberate further.

16 The reporter will read to you what he has found.

17 (A portion of the direct examination and a portion
18 of the cross examination of the witness Starbuck was read
19 to the jury.)

20 THE COURT: Is that sufficient, Mr. Brown?

21 THE FOREMAN: Yes, sir.

22 THE COURT: All right. Then we will turn to the
23 next question.

24 "David Miley involvement driving to Vavarigos'
25 apartment."

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I think if the reporter will turn to the events of December 17, 1973, in the testimony of Michael Starbuck, it is possible that that is what the jury wants.

(That portion of the witness Starbuck's testimony was read.)

THE COURT: Does that go far enough or is there more you wish to hear on the same subject?

THE FOREMAN: Sir, there is just one point. There are some jurors that would probably like to have you reiterate what is the meaning of the conspiracy.

Sorry, they asked me to do it so I ask.

THE COURT: Have we covered this second point?

THE FOREMAN: Yes, yes.

THE COURT: Let me see if I can't go back a moment to the charge.

Let me just repeat and continue with the charge and see if this is what is troubling the jurors.

I said to you, in substance, what is a conspiracy? It is simply a combination or agreement or a scheme of two or more persons or concerted acts by two or more persons to accomplish a criminal or unlawful purpose. The gist of the offense is the combination or agreement to violate the law. In this case the violation charged is a violation of the federal drug laws, as I mentioned, in furtherance

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of which an overt act was committed according to the indictment.

It is sufficient if two or more persons in any manner, impliedly or tacitly, come to a common understanding to violate the law. It is not necessary that the persons charged sit down and enter into a formal agreement or that they state all the details of their agreement or scheme or how it was to be effectuated.

A conspiracy may, on occasion, involve a matter of inference to be drawn from the conduct of the persons charged. Actions may often speak louder than words, and a defendant's participation in a conspiracy may be inferred from such facts and circumstances in evidence as appear to you logically to support or sustain such an inference. It is sufficient if it be shown beyond a reasonable doubt that the defendant and an alleged co-conspirator came to a mutual understanding to accomplish an unlawful act.

To determine whether a conspiracy existed you piece together the independent evidence relating to each alleged conspirator and determine, looking at the whole picture, whether the acts, conduct and statements of the alleged conspirators and the reasonable inferences to be drawn from their acts, conduct and statements establish to your satisfaction beyond a reasonable doubt that there was

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gth

a conspiracy.

If, for example, there was a concerted action among several persons with each of them doing something related to the act of the other all of which contributed in the same or similar manner toward the accomplishment of some unlawful objective, such evidence would support the inference that those persons had conspired together to accomplish that unlawful purpose.

I call to your attention that an unlawful scheme or agreement may exist even though the individual alleged conspirators may have done some acts in furtherance of a common unlawful purpose apart from and even unknown to the others.

Is that of any help to the jury?

You seem to be nodding that it is.

The remaining question is, as you put it, on Dave Ross Miley, actions on February 12, 1974, in the book store.

I will ask the reporter to turn to the testimony of Robert Nieves on February 12, 1974, to see if that is what you have in mind.

(The direct examination of the witness Nieves was read to the jury.)

THE COURT: This goes off the question of David Miley's actions on February 12th.

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Does the jury want to hear Palombo's statement about February 12th?

THE FOREMAN: No, your Honor.

THE COURT: Has the jury heard as much as it requests to hear at this time?

THE FOREMAN: Yes, your Honor.

THE COURT: All right. You may retire.

MR. FRACTENBERG: May I ask --

THE COURT: Just a minute. Come up here if you want to ask, don't ask in front of the jury.

(At the bench.)

MR. FRACTENBERG: The jury brought in on the first slip of paper the third question asking, "David Miley's involvement driving to Vavarigos' apartment," and I understand that this referred to the incident which took place on December 17, 1973.

You, Mr. Reporter, read back what Mr. Starbuck said on direct. I suggest, if it is at all possible, to read back what Mr. Starbuck said on cross.

THE COURT: I requested to know from the jury whether they had heard as much as they wanted to hear. There were others who spoke on the subject and got the affirmative statement that the jury had heard what they wanted to.

As a matter of fact, my recollection is that

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2 they cut me off and cut the reporter off and got back
3 to wanting to hear the definition of conspiracy again
4 at that point and that was the thing that interested them,
5 and I am not going to force them to listen to anything
6 they don't want.

7 I have given them a full opportunity here to
8 request anything that they want, but I am not going to
9 put before them or propel anything before them that they
10 don't ask me for.

11 MR. FRACTENBERG: But it calls for his involvement
12 on the driving to Vavarigos' house.

13 THE COURT: A lot of things occurred in the record
14 that have not been reread, otherwise we would be rereading
15 four days of testimony. In each instance the jury was
16 requested to say whether they had heard what they wanted
17 to hear and you were here and heard their response.

18 I, therefore, am not at liberty to compel them
19 to listen to any more.

20 MR. FRACTENBERG: Okay. I asked.

21 (At 4:30 P.M. the jury retired to the jury room
22 to continue to deliberate upon a verdict.)

23 (Court Exhibits 3, 4 and 5 marked for identifica-
24 tion.)

25 MR. FRACTENBERG: Your Honor, may I approach again

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2 for the record?

3 THE COURT: Mr. Fractenberg has requested that
4 I send in to the jury the note which is marked Court's
5 Exhibit No. 6, which reads as follows:

6 "One of the lawyers wants to know whether the
7 jury desires to hear what Starbuck said on cross-
8 examination as to David Miley's involvement to Vavarigos'
9 apartment. Does the jury want this?"

10 Then there is a box for them to check yes and a
11 box for them to check no.

12 At the express request of the attorney for
13 Miley, that note will be sent in to the jury.

14 MR. FRACTENBERG: Thank you.

15 (At 4:40 P.M., a note was received from the jury.)

16 (In open court in the absence of the jury.)

17 THE COURT: Mr. Fractenberg, the jury has
18 responded to your inquiry, Exhibit 6, by checking no,
19 and that will be filed.

20 MR. FRACTENBERG: Thank you, your Honor.

21 Your Honor, I must at this time make this request:

22 I think that the request from the jury asked for
23 "David Miley's involvement driving to Vavarigos' apartment,"
24 and I don't think that the reading of the direct or the
25 sending in of the question gives fully what was the

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2 involvement of David Miley on driving to Vavarigos'
3 apartment.

4 THE COURT: Mr. Fractenberg, I am not going to
5 permit you to play fast and loose with the court.

6 I gave you the opportunity of finding out whether
7 the jury wanted to read anything additional, you approved
8 that form and the jury has answered it.

9 MR. FRACTENBERG: Okay.

10 (The jury entered the courtroom at 4:50 P.M.)

11 (Jury roll called; all present.)

12 THE CLERK: Mr. Foreman, have you reached a
13 verdict?

14 THE FOREMAN: Yes, we have.

15 THE CLERK: I will read your verdict as you
16 have handed it up to the court.

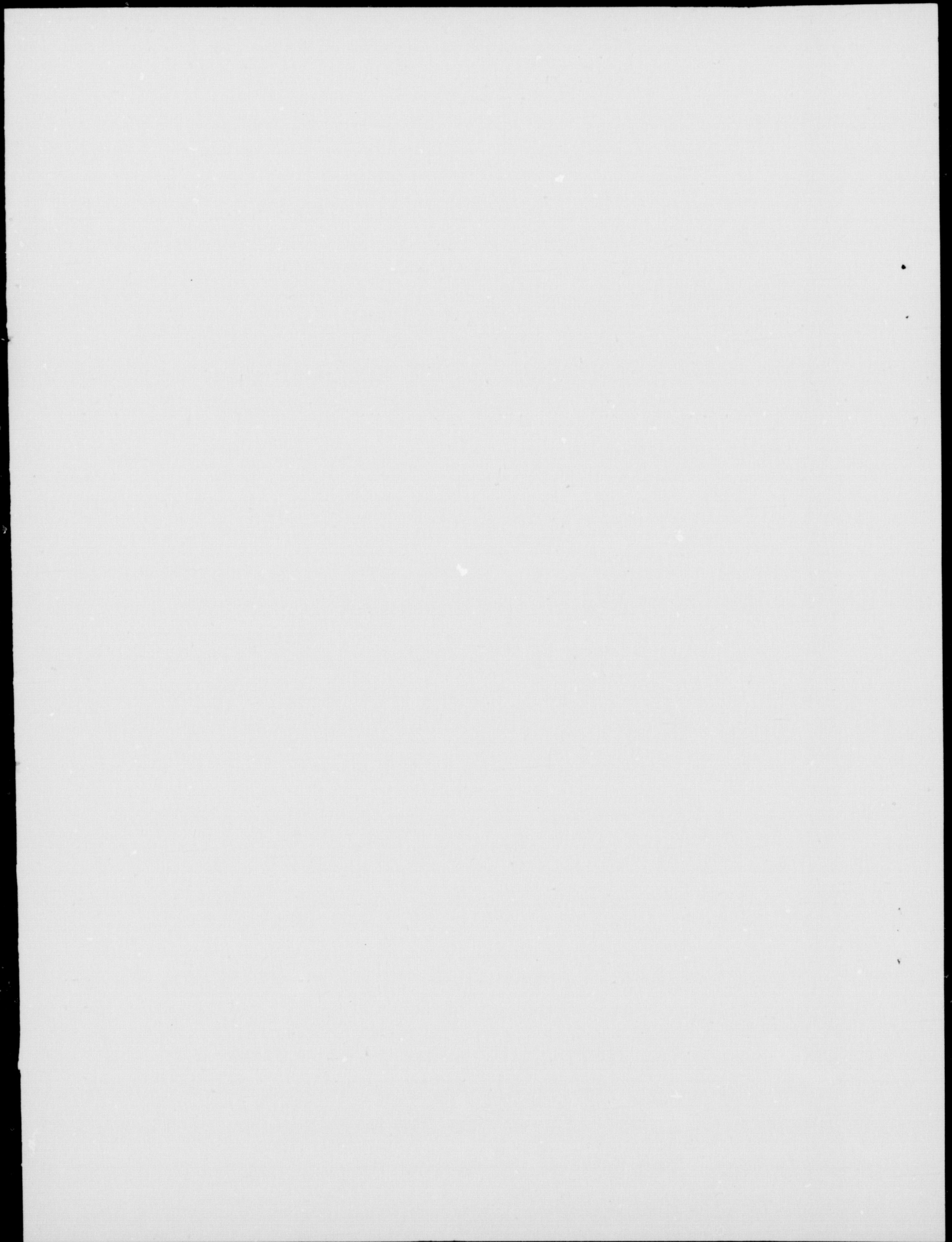
17 You say that you find the defendant David Ross
18 Miley guilty as charged on count 1.

19 The defendant Joseph R. Wenzler guilty as charged
20 on count 1.

21 The defendant Dean P. Vavarigos guilty as charged
22 on count 1.

23 The defendant David Flores guilty as charged on
24 count 1.

25 The defendant Marvin T. Goldstein guilty as



US COURT OF APPEALS: SECOND CIRCUIT

USA,
Appellee,

against

WENZLER,
Appellant,

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

I, Victor Ortega, being duly sworn,
deposes and says that deponent is not a party to the action, is over 18 years of age and resides at
1027 Avenue St. John, Bronx, New York
That on the 25th day of November 1974 at ~~East 10th St~~ Foley Square, New York
deponent served the annexed *Appendix* upon

Paul J. Curran

the in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the Attorney(s) herein,

Sworn to before me, this 25th
day of November

19 74

Victor Ortega
Print name beneath signature

VICTOR ORTEGA

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0413950
COMMISSION IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975